1/2

INFORMATION

FOR

Cochrane

Thomas Earl of *Dundonald*;

AGAINST

JAMES *Marquis of* CLYDSDALE.

INFORMATION

FOR

Henry Earl of Dumbarton;

AGAINST

JAMES Marquis of GRAHAM.

July 3. 1725.

INFORMATION for the Earl of *Dundonald*;

Againſt the Marquis of Clydſdale.

WILLIAM first Earl of *Dundonald*, by diverſe Conveyances in the Years 1653, 1656 and 1657, ſettles his Eſtate upon *William* Lord *Cochran his eldeſt Son, and the Heirs* MALE *of his Body; whom failing*, to RETURN *to himſelf*: And in the Years 1680 and 1684, the ſame Earl *William*, after the Deceaſe of his ſaid Son, renews the Settlement in Favours of *John* Lord *Cochran his eldeſt Grandſon, and the Heirs* MALE *of his Body; whom failing*, to William Cochran *of* Kilmaronnock *his ſecond Grandſon*, Father of *Thomas* the preſent Earl, *and the Heirs* MALE *of his Body; whom failing, to his other Grandſons*, Heirs Male of the Body of his ſaid deceaſt Son, *in their Order; whom failing*, to HIMSELF in the Terms of the former Settlements; *whom all failing, to the eldeſt Heir Female of his own Body, without Diviſion.*

All the Settlements of the Eſtate are to Heirs Male.

The Inveſtitures and Infeftments that followed on theſe Deeds, have from Time to Time continued to be the Titles of the Family to their Eſtate; nor has there any Deed been made at any Time ſince, which at this Day can produce an Alteration in the Courſe of Succeſſion as thereby eſtabliſhed: For tho' the ſaid *John* Lord *Cochran* appears to have had ſome Intention, by a Procuratory of Surrender in the Year 1688, ſo far to alter the former Settlements, as to bring in the Heirs Female of his own Body, before the other Heirs Male of the Inveſtiture, yet, as no Surrender or Infeftment followed on that Procuratory, and the ſame was wholly neglected by his two Sons, Earls *William* and *John*, who one after the other ſucceeded, and made up their Titles by Service on the Footing of the former Inveſtiture; ſo the ſaid Earl *John* laſt mentioned, in his Contract of Marriage in the Year 1706, ſettled the Eſtate upon Heirs Male, in the Terms of the ſaid ancient Inveſtitures.

These Settlements at this Day not altered.

But having in this Contract neglected to provide, that in Case the Estate should devolve on Females, or Heirs whomever, it should go to the eldest Heir Female without Division, as by the saids antient Investitures was appointed, he, to rectify that Omission, executed a Bond of Entail in the Year 1716, by which, *failing Heirs Male of his Body, or Heirs Male of any of the Descendants of his Body* (meaning the Heirs Male of the Investiture, who were all Heirs Male to the Descendants of his Body) he calls Lady *Anne Cochran* his eldest Daughter, afterwards Dutchess of *Hamilton*, and his other two younger Daughters in their Order, and the Heirs Male of their Body, to the Succession in the whole Estate without Division, agreeable to the antient Settlements.

And tho' again in the Year 1722, Earl *William* his Son did in his Minority erroneously grant a Procuratory of Surrender in Favours of the said Lady *Anne*, and the Heirs Male of her Body, *&c.* as in Implement of the said Bond granted by her Father in the 1716, and calling her to the Succession before his Heirs Male, tho' by the Bond 1716 no such Thing was meant or intended, yet he did afterwards, upon more mature Deliberation, recal the said Procuratory, and by solemn Deeds settled the Succession upon the Heirs Male of his own Body; whom failing, upon *Thomas Cochran* then of *Kilmaronnock*, the present Earl, who, as Grandchild to the said *William* Lord *Cochran* by his second Son, was next Heir of the Investiture.

Succession devolves on the present Earl.

The said Earl *William* last deceased, dying in the Year 1725, without Heirs Male of his Body, the Succession devolved upon the said *Thomas* now Earl of *Dundonald*, in the Terms, not only of these later Deeds, but in the Terms of the saids antient Settlements.

The Marquis of Clydsdale makes a Claim, and attempts to serve Heir.

But *James* Marquis of *Clydsdale*, Son and Heir of the said Lady *Anne Cochrane* Dutchess of *Hamilton*, imagining, that by the said Bond of Entail 1716, the said Lady *Anne* his Mother was called to the Succession of the Estate upon the Failure of Heirs Male of Earl *John* the Granter's Body; and that the Deeds done by Earl *William* his Son in the 1725 were void, as done in his Minority and on Death-bed, he thought fit to lay Claim to the Estate of *Dundonald*, in vertue of that Bond in the 1716, and also in vertue of the foresaid neglected Procuratory 1688, and revoked Procuratory in the 1722, by which two last Deeds the Succession had been intended to be settled upon the eldest Heir Female. For which End, he obtained Brieves from the *Chancery*, directed to the *Macers of Session*, for serving himself Heir of Provision, to the said Earl *William* last deceased his Uncle, Earl *John* his Grandfather, and *John* Lord *Cochrane* his Great-Grandfather, who had granted these Deeds.

Opposed by the Earl.

Thomas the present Earl of *Dundonald* being advised, that those Deeds under which the Marquis claimed, particularly the Bond of Entail 1716, had no such Import or Meaning, as the Marquis endeavoured to put upon it; and that for diverse other Reasons, neither the said Bond, nor the other Deeds above-mentioned, could be of any Force or Effect in Law, to disappoint his Right, to the ancient Inheritance of his Ancestors, whose Care it had been to guard the Investitures against all gratuitous Deeds of Alteration, he resolved to oppose the Service; and therefore applied to the *Lords of Session*, and ob-

obtained two of their Number appointed *Aſſeſſors* to the *Macers*, as Uſe is, when Difficulties ariſe, and Objections are to be made to a Service.

It was neceſſary in Form, that the Marquis ſhould offer his Claim to the *Macers*; but as he foreſaw the Difficulty he muſt needs have found in carrying on the Service; and was ſenſible how fruitleſs and unprofitable it ſhould be for him, even to prevail in a Service as Heir of Proviſion, by which he could only have carried the Right of Obligation, ſuch as it was in the aforeſaid Deeds, ſhould it thereafter be found, that they were either altered, or flowed from Perſons who had not Power, by ſuch Deeds, to alter the former Settlements in Prejudice of the Heir of Inveſtiture; He did from a juſt Diffidence of Succeſs agree, that his Service ſhould ſtop till the Point of Right ſhould be determined: Which being reported by the *Aſſeſſors*, the Lords were pleaſed, by their Interlocutory Sentence the 24th of *February* laſt, *To ordain Parties to be ſummarily heard to debate the Title in their own Preſence the 4th of* June *thereafter.*

The Marquis agrees to ſtop his Service, till his Title be tried.

Mutual Proceſſes of Declarator have accordingly been raiſed and inſiſted in: The Marquis of *Clydſdale* brought an Action to have it declared, That by the ſaid Bond of Entail, made by Earl *John* his Grandfather in the Year 1716, the ſaid Earl had obliged himſelf and his Heirs, upon the Failure of Heirs Male of his own Body, to reſign his Eſtate in Favours of Lady *Anne Cochran* his eldeſt Daughter, and the Heirs Male of her Body; whom failing to his other two Daughters Lady *Suſan* and Lady *Katharine Cochranes*, one after the other, and the Heirs Male of their Bodies: And that the Heirs Male of the ſaid Earl *John's* Body having failed, therefore he the Marquis, as Heir Male of the ſaid Lady *Anne's* Body, ſhould be declared Heir of Proviſion to the ſaid Earl his Grandfather; and that the Earl of *Dundonald* might be decerned to make up his Titles to the Eſtate, and then to diveſt himſelf thereof in his Favours? In which Declarator he alſo took Notice of the other Deeds, ſaid to have been made in Favours of Heirs Female by his Uncle Earl *William* in the 1722, and his Great-Grandfather *John* Lord *Cochran* in the 1688; but the Weight of the Argument turned chiefly upon this Bond of Entail 1716.

The Marquis's Claim and Title.

On the other Hand, the Earl of *Dundonald* brought a Counter-Action of Declarator by Way of Defence, that it might be found and declared, *Firſt*, in general, that the Inveſtiture of the ſaid Eſtate, ſtanding conceived in Favours of the Heirs Male deſcending of the Body of *William* firſt Earl of *Dundonald*, the Right of Succeſſion had, upon the Death of Earl *William* laſt deceaſed, devolved upon him the preſent Earl, as neareſt Heir Male of the ſaid Earl *William's* Body.

The Earl's 1. Defence.

2dly, That ſuch was the Nature and Conception of thoſe Inveſtitures, That it was not in the Power of either of the ſaid two *Johns*, or of *William* laſt Earl of *Dundonald*, by any gratuitous Deed, ſuch as all and each of theſe were under which the Marquis claimed, to alter the Courſe of Succeſſion in any Part of the Eſtate, which their Anceſtor had eſtabliſhed for the Preſervation of his Name and Family, and that his Eſtate and Honours, which by his Patent were to deſcend in the ſame Channel, might not be ſeparated.

The Earl's 2. Defence.

3*dly*, That

The Earl's 3d Defence.

3dly, That in so far as concerns the Lordship of *Paisley*, and certain other Parts of the said Estate, the said Deeds should, for a special and seperate Reason, be declared of no Effect in Law, to prejudge the Right of the present Earl; In Regard, That tho' the Fee of those Parts of the Estate had been habily vested by Infeftment, in the Person of *William* Lord *Cochran*, eldest Son and Heir to *William* first Earl of *Dundonald*, yet the succeeding Earls had never made up any Title in their Person thereto, as Heirs to him, which therefore at this Day was in *hæreditate* of the said Lord *Cochran*, and to which the present Earl of *Dundonald* his Grandson and apparent Heir Male has the only Right.

The Earl's 4. Defence.

4thly, Tho' the said later Earls of *Dundonald* had made up their Titles in the regular Way the Law directs, yet, as it was not in their Power to have gratuitously altered the Course of Succession, which *William* the first Earl, their Ancestor had established; so, according to the plain Sense and Import of the said Bond of Entail 1716, Earl *John* had not thereby discovered any Intention to exceed the Powers he had by Law, but only upon Failure of Heirs Male of the Investiture, to call the said Lady *Anne*, and his other Daughters to the Succession in the precise Terms of the ancient Settlements.

The Earl's 5. Defence.

And in the last Place, That in no Event could the said Bond 1716, nor any of the other two Deeds in 1688 and 1722 be of any Force, not only as being all personal Deeds never fully executed by the Granter, nor recorded in the Register of Entails, as the Act of Parliament 1685 directs, but also as being altered for most reasonable Causes, particularly the said Bond 1716 by the subsequent Deeds of Earl *William*, in the Year 1725, in Favours of the present Earl, the true Heir of the Investiture, and that the Deeds in the 1725 might be declared to be good Deeds, notwithstanding of the Objections that were levelled against them.

Parties ordained to inform.

Upon the several Points in these mutual Declarators, Parties having been at great Length heard, were ordained to inform upon the Debate. In Obedience whereunto, this Paper is humbly offered: And that the Argument may the more distinctly proceed upon the several Points, in the Order as they are above stated in the Earl's Declarator, he shall, as he proceeds to each Point, premise so much of the Writs as he shall have Occasion to found upon, referring to full Abstracts thereof in the printed Schedule hereunto annexed.

The Earl's 1st and 2d Defences. He is Heir of the Investiture, and the Course of Succession was not alterable.

The general Part of the Earl's Declarator, That he is lawful and nearest Heir of the Investiture, being by the Marquis of *Clydsdale* admitted: The first Thing the Earl proposes to clear, is, That supposing there had been no Defect in the Titles of the several later Earls, who are said to have made the aforesaid Deeds of Alteration, yet the Nature of the Investiture was such, that it was not in their Power, without a valuable, or at least a rational Consideration, to have altered the former Course of Succession; a Point which reaches over the whole Estate that flowed from *William* first Earl of *Dundonald*.

The Will of the Donor equal to a Prohibition not to alter.

There are no less than five several Conveyances, proceeding at different Times from the said first Earl, in the Course of about 30 Years, all setling

ing the Estate on the Heirs Male, each of which, the Earl humbly believes to be of that Nature, that they could not be voided at the Pleasure of the Substitutes, tho' they were seperately to be considered; and the Intention appears yet so much the stronger, where there is a Tract and Series of Conveyances all calculated in the same View. It is very true, that there is not in any of these Deeds, an express Clause prohibiting the Heirs to alter the Succession, but, the Earl hopes to make it exceeding plain, that there is what in Law has the same Effect: For tho' simple Substitutions, where a Man destinates a Succession to himself, by resigning his Estate *in his own Favours, &c.* with a Substitution of several Heirs to himself, may be altered by all the Substitutes as they succeed, at Pleasure, such Destinations being on the Part of the Granter, who retained the whole Right in himself, but a simple gratuitous Nomination of Heirs, under no Limitation, other than, what all unlimited Fiars are subjected to, that they have it not in their Power, to alter upon Death-bed; yet if it shall appear from the Deed it self, and other Circumstances, that such was the Will and Intention of the Maker of an Entail, that the same should not be alterable at the Discretion of the Substitutes, his Will and Intention will in Law have the same Effect against the subsequent Heirs, who possess in the Right of his Deed, that they cannot alter the Succession gratuitously, as if his Will had been declared in express Terms.

A Prohibition not necessary to be expressed.

The Procurators for the Marquis of *Clydsdale* have indeed thought fit, to dispute this general Point, and to plead that all Substitutions without Distinction, are no other of their Nature than naked Destinations of Succession, unless the same be guarded by express prohibitory Clauses; and that where there are no such Clauses, the Presumption is that the Granter intended the Substitutes should be under no Restraint: Which obliges the Earl, before he enter upon the Argument, as to the Particular Import of the present Deeds, to establish *in limine* this general Point, without which he should be at some Loss in the Question, 'That prohibitory Clauses, are not by any Law or Statute, necessary by way of Solemnity, to introduce an Unalterability of the limited Succession, but are singly regarded, as an explicite Proof of the Intention and Will of the Entailer, that the Course of Succession should not be altered; and that therefore, a Prohibition to alter plainly implied and discovered from other Circumstances, especially such as arise *from the Nature and Conception of the Deed it self*, ought in Law to have the same Effect'; and then the Earl shall satisfie the Lords that there are such Circumstances in the present Case.

An implied Prohibition equal to one expressed.

That an Obligation implied, from the Circumstances of any Transaction or Clauses in Writs, is of the same Efficacy as an Obligation in formal and direct Terms, seems to be a Point well established; 'tis a Principle laid down by our learned Author, the Lord *Stair*, in his Institutions, *Lib.* 1. *Tit.* 10. *Page* 98. *in medio*, That *in all Deeds or Contracts, not only that which is expressed must be performed, but that which is necessarily consequent and implied.* Numbers of Authorities might be brought from Foreign Lawiers †, who all agree in this, That even in the Matter of *fideicommisses*, and Substitutions of Heirs, *Nil obstat*

† Voet. de Pact. Dotal. N. 71. quid. papæ Decis. 467. Menoch de Presumpt. 4. 68. Tit. 13, 14. Pereg. de fideicom. Art. 25. N. 27. & innumeris aliis locis. Cod. Fabr. de fideic. def. 3.

olysat, aut ex conjecturis & indiciis verisimilibus, vel presumptionibus, mens & intentio in nonnullis esse queat? And which is conform to the *express Text* of the Civil Law, *Leg. 16. Cod de fideicommissis.* But the plain Reason of the Thing is stronger than a hundred Authorities, namely, *That it is the Consent and Will of Parties that induces Obligations*; And it imports nothing, whether the same do appear in formal Words, or if from the Deed it self and other Evidences, this Will and Intention of Parties does fully appear.

The Rule holds in Succession.

Nor does this Rule only hold by our Law in explaining personal Deeds, as Contracts for Moveables or Testaments, and the like; for it will be found, That by this very Rule, the Lords have determined upon the Import and Effect of Settlements of Succession in Land Estates; nay, that they have thereby constantly decided, so oft as the Case came before them.

A Prohibition only implied in onerous Entails, which yet are not alterable.

For what other Reason is it, That onerous Entails or Bonds of Entail for valuable Considerations, tho' bearing no expreſt Prohibition or Obligation not to alter, are yet of their Nature not alterable gratuitously? The Rule is, That a Bond of Entail, conceived in Favours of the Granter and certain Substitutes, is alterable at the Pleasure of the Maker; yet a Bond of Entail granted for a valuable Consideration, tho' by its Conception not differing in a Letter from the other, cannot be gratuitously altered; for which Difference no other Reason can be assigned, than the implied Will and Intention of Parties, and that it is not to be presumed, one would have given a valuable Consideration for an empty Hope. *Nemo presumitur spem pretio emere.*

A Prohibition only implied in mutual Entails, which yet are not alterable.

'Tis likewise upon the same Ground of Law, That mutual Entails are found to carry in them an implied mutual Obligation not to alter, whilst yet according to their Tenor and Conception, they have the Appearance of common Destinations; for there can be no other Reason, why a Distinction is made betwixt such Entails and the ordinary kind of Destinations, but that, in these Men are understood to have in their Eye, the Preservation of their Families, and thence are presumed to have intended, to restrain one another from gratuitous Alienations. And now that Entails for Preservation of Families are mentioned, the Lords may please to cast their Eye upon a Decision observed by *Durie, March* 4. 1634. where the Entail by the Family of *Hume* to *Hume* of *Coldingknows*, tho' containing no prohibitory Clause or Obligation not to alter, was found not alterable, solely because of the Recital on which it proceeded, *That* the same was made *for Preservation of the Honour of the House of* Hume, *and the ancient Dignity and Estate thereof, and that it might remain with the Name of* Hume, which are the only special Causes assigned in the said Recital.

So adjudged in the Earl of Hume's Case.

Marriage Settlements imply a Prohibition arising only from presumed Intention.

It is upon the same Foundation likewise, that Obligations in Marriage Settlements cannot be evacuated, in which, tho' generally the Substitution is of the most simple Conception, without any expreſs Limitation upon the Father, who remains full Fiar of the Estate; yet he cannot disappoint the Children of the Marriage gratuitously, even tho' they are his Heirs and represent him; because it is presumed, that such was the Will and Intention of the Parties. The Wife's Friends would not have engaged in the Marriage Settlement, for the bare Hope of a Succession, which the Husband might disappoint at Pleasure; whereby the Children, while they are Heirs, have the mixed Character of Creditors, and the Ground upon which a Reduction of their Fa-

ther's

ther's gratuitous Deeds to their Prejudice proceeds, is by no Means the Force of the expreſs Obligation that he undertakes; but that ſuch Deeds are *contra fidem tabularum*: For ſhould a Father make a Settlement in Favours of any of his Children, and expreſs the Obligation upon himſelf, in the ſelf ſame Words and Tenor, in any other Deed or Writing, than in a Contract of Marriage, the ſame ſhould be alterable by him at Pleaſure.

Clauſes of Return equal to a Prohibition from a preſumed Intention only.

There are many known Caſes alſo, wherein it has been *adjudged by the Lords*, that Entails, in which the Granter denudes himſelf of the Fee, and again ſubſtitutes himſelf to the Fiar, *or in other Words*, Entails bearing a Clauſe of *Return*, are of the ſame Effect, as if they had contained a *prohibitory* Clauſe, (which there will be more particular Occaſion to notice afterwards,) and which proceeds on the ſame, and no other Foundation, than *the preſumed Will of the Maker*. A very recent Caſe the Lords may probably remember, betwixt *Moffats* and *Moffat*, determined no longer ago than *Febr[illegible]* Where one *Moffat* having diſponed his Effects in Fa[illegible]other and two Siſters, and the Heirs to be procreate of th[illegible] and in Caſe of any of them ſhould dy without Children, he ſubſtituted the others in theſe Words, *That the Deſcendant's Share ſhould accreſce and fall to the Survivers*, but without any Prohibition on the Diſponees; But on the contrary, the Diſpoſition contained a Power to the Diſponees *to intromet with and diſpoſe on the Subjects*; yet, becauſe of the *preſumed Will* of the Donor only, the *Survivers* were *preferred* to the *gratuitous* Diſponee, of one dying without Heirs of his Body.'

The Will of the Donor adjudged equal to a Prohibition, Moffat contra Moffat.

And thus 'tis hoped the general Point is cleared to the Satisfaction of the Lords; *That an expreſs Prohibition not to alter, is not by our Law neceſſary, to reſtrain Heirs of Entail from gratuitous Deeds of Alteration: But that the preſumed Will of the Maker, diſcovered from the Nature of the Deed and other Circumſtances, is ſufficient for that Purpoſe*: Which naturally leads in the next Place to examine, Whether there be ſufficient Evidence in this Caſe to preſume ſuch Will and Intention? And for this Purpoſe, it will be neceſſary to premiſe the State and Nature of the Conveyances, which flowed from *William* firſt Earl of *Dundonald*, in Favours of the Lord *Cochran* his Son, and the other Deſcendants of his Body, which, as before obſerved, are about five or ſix in Number, each of which the preſent Earl believes, to be conceived in ſuch Manner, as ſhow a plain Intention, *That the ſame ſhould not be alterable at the Pleaſure of the ſeveral Subſtitutes*; but, which is yet more ſtrongly enforced, where there is a Tract and Series of Conveyances, calculated in the ſame View.

The Earl proceeds to ſhow, that in his Caſe there is an implied Prohibition from the Will of the Donor.

Recital of the Settlement, 1653.

William firſt Earl of *Dundonald*, in the Marriage Settlement betwixt *William* Lord *Cochran* his eldeſt Son, and Lady *Katharine Kennedy*, Daughter to the Earl of *Caſſils*, in the Year 1653, diveſts himſelf of the Lands of *Dundonald*, *Ochiltree*, and ſeveral other Lands, partly irredeemably, and partly under Reverſion, *in Favours of his ſaid Son, and the Heirs* MALE *of the Marriage*; *whom failing, to* RETURN *to himſelf*, &c.

Recital of the Settlement, 1656.

Thereafter in the Year 1656, there is a mutual Contract betwixt the Earl of the one Part, and his ſaid Son the Lord *Cochran* with Conſent of the Lady and the Earl of *Caſſils* her Father of the other Part, whereby the Lord *Cochran* exchanges with his Father the Lands of *Ochiltree*, which had been diſponed to him irredeemably in his Marriage Settlement, with the Lordſhip of *Paiſley*, an Eſtate of much greater Value, which the Father thereby diſpones *to him and the Heirs* MALE *of the Marriage; whom failing, to* RETURN *to the Earl himſelf*, &c.

Recital of the Settlement, 1657.

In the Year 1657, there is another mutual Contract betwixt the ſaids Parties, whereby the ſaid Earl renounces the Reverſion of certain of the Lands that had been diſponed under Reverſion in the Marriage Settlement, and to ſhow the Anxiety the Father had to preſerve his own Subſtitution; (in which View only this third Writ is noticed) the Renunciation is conceived in the ſame Terms, *In Favours of his Son, and the Heirs* MALE *of his Body; whom failing, to* RETURN *to himſelf*, &c.

Recital of the Patents of Honour.

Theſe Settlements were all made whilſt the Earl was only Lord *Cochran*, and before he was raiſed to the Dignity of Earl of *Dundonald*: And as his Patent, As LORD, was limited to *himſelf, and the Heirs Male of his Body*; ſo he was not anxious, by theſe Settlements, to extend the Subſtitution of Succeſſion, further than to the Heirs Male of his Son's Body; whom failing to return to himſelf, &c. But thereafter in *May* 1669, he is created EARL of DUNDONALD, by Patent in thoſe Terms, *To him and his Heirs Male, whom failing to the eldeſt Heir Female, procreate or to be procreate of his Body without Diviſion, and the Heirs Male to be procreate of the Body of the ſaid eldeſt Heir Female, carrying always the Sirname and Arms of* Cochran, *which they are bound to aſſume in all Time thereafter; whom all failing, to his neareſt Heirs whomever.*

Lord Cochran's Death and Iſſue.

The Earl's Son *William* Lord *Cochran* died *anno* 1679, leaving Iſſue of his Marriage, *John* his eldeſt Son, afterwards Lord *Cochran* and Earl of *Dundonald*, *William* his ſecond Son, Father of the preſent Earl, and *Thomas* and *Alexander*, in Favours of all and each of whom ſucceſſively, as Heirs Male of the Lord *Cochran*'s Body, the Eſtate was provided; whom failing to return to the Earl.

Recital of the Settlement 1680.

The Earl, after obtaining the foreſaid Patent, and his Son's Death, executes a new Conveyance of the Eſtate in the Year 1680, whereby, without taking any Notice of the former Settlements he had made to his Son, (as ſhall be afterwards remarked in another View) he, agreeable to the Deſcent of the Honours, makes a Surrender of his whole Eſtate in Favours of *John* Lord *Cochran his eldeſt Grandſon, and the Heirs* MALE *of his Body; whom failing, to* William Cochran *his ſecond Grandchild*, Father of the preſent Earl, *and the Heirs* MALE *of his Body; whom failing, to his Third and Fourth Grandſons ſucceſſively, and the Heirs* MALE *of their Bodies; whom failing, to himſelf*, that is to return to himſelf, *and the other Heirs Male of his Body; whom failing, to his Heirs and Aſſignees whomever*; "the eldeſt Heir "Female ſucceeding without Diviſion, and bearing the Name and Arms "of *Cochran*, under *an expreſs Irritancy upon her in Caſe of Contravention*," with a Reſervation at the ſame Time of ſeveral Powers and Faculties to himſelf of alienating the Eſtate, and burdening the ſame with Debts.

But

But then in the Year 1684, by the Matriage Settlement betwixt the ſaid *John* Lord *Cochran*, and Lady *Suſanna Hamilton*, now Marchioneſs of *Tweedale* (in which Notice is indeed taken of the Rights that ſtood in the Perſon of the deceaſſed Lord *Cochran*) the Earl obliged himſelf to diſcharge and renounce theſe Faculties reſerved in the Settlement 1680; and he and his ſaid Grandſon, for their ſeveral Intereſts, concur in a Settlement in the ſelf ſame Terms as were contained in that Settlement 1680, and with the ſame ſpecial Proviſion of "Return to, or Subſtitution of, 'the Earl himſelf, and the other Heirs Male of his Body, on the Failure 'of the ſaid Lord *Cochran*, and the Heirs Male of his Body, and 'of the other Heirs Male *nominatim* ſubſtituted", which in all thoſe ſeveral Conveyances is anxiouſly ingroſſed as a Condition of the Right. AND of the ſame Date with this Settlement, and for Performance of the Earl's Obligation therein-contained, he by a ſeparate Deed Renounces, in Favours of the ſaid *John* Lord *Cochran* his Grandſon; *whom failing, to his Heirs of Entail and Proviſion, mentioned in the Settlement*, (which is the ſame Thing as if he had ingroſſed the whole Subſtitution therein-contained;) all the foreſaids Powers and Liberties of ſelling or burdening, *&c.* which he had reſerved by the Settlement 1680, or the former Settlements of the Eſtate.

Recital of the Settlement 1684.

From theſe ſeveral Deeds and Conveyances, there ariſe various Obſervations, which the Earl hopes will afford full Evidence to your Lordſhips that ſuch was the Will and Intention of the Granter, that it ſhould not be in the Power, of the firſt Fiars or the Subſtitutes, gratuitouſly to evacuate the Settlement he had made.

Obſervations to be made from theſe Settlements, that they are not alterable.

And the *Firſt* Obſervation the Earl ſhall make, is founded upon the Proviſion, 'That the Eſtate upon failure of the Fiar and Subſtitutes particular-'ly named, ſhould return to himſelf;" which he hopes on ſolid Grounds of Law to maintain of itſelf *ſufficient in this Caſe to carry in it an implied Prohibition not to alter.* 'Tis true, that in the three laſt mentioned Deeds we do not find the Word *Return*: But there occurs in thoſe Deeds the individual ſame Thing; For he diveſts of the Right, and *ſubſtitutes himſelf* to the Donees, which both in good Senſe and Law is a Clauſe of *Return* to himſelf upon the Event of their Failure. It ſhall not be denied, but on ſome Occaſions, there has been a Kind of Argument made from the Emphaſis of the Word *Return*, to ſhow the Intention of Parties, that it ſhould not be in the Power of the Heirs to alter the Succeſſion gratuitouſly: But when the Deciſions of the Lords are looked into, by which they have adjudged Clauſes of *Return* to import a Prohibition to alter, theſe Deciſions will be found to ſtand upon the more ſolid Foundation of Principles of Law, which equally apply to the one Caſe as to the other.

A Clauſe of Return to the Donor, and Subſtitution of the Donor himſelf, have the ſame Operation in Law.

Taking it then for granted, that the *Return to himſelf*, and the *Subſtitution of himſelf* are the ſame Thing, and which the after Argument will fully confirm, the Earl ſhall firſt ſet forth what he takes to be the ſolid Ground in Law upon which thoſe Kind of Subſtitutions have a different Effect from common Deſtinations of Succeſſion; and next ſhall confirm it from the Opinion of Lawyers, and the Deciſions of the Lords in thoſe Caſes, wherein

The Ground in Law is to be ſet forth, on which ſuch Return or Subſtitution implies a Prohibition.

wherein they have *adjudged* them to have the Effect of a Prohibition, and that upon those Principles, to be just now mentioned, and no other, those Decisions did proceed; and when that is once done, the Application will be easy, why the same ought to be *adjudged* in the present Case.

Intails wherein there is a Substitution of, or Return to the Donor, are not alterable gratuitously.

The Principle, the Earl humbly believes to be no other than this, *That Entails which are made for onerous Causes*, that is, when any of the Substitutes give a valuable Consideration for their being substituted, *cannot be gratuitously evacuated in Prejudice of that Substitution.* The Principle is certain and undoubted. The only Question is, How Entails with a Clause of Return are reduced to it? But this he likewise takes to be no less plain from this single Proposition, 'That where the Maker of an Entail divests himself of 'the Fie, and substitutes himself to his own Donees, such Substitution 'is purchased by him at no less Value than the Price of the whole Sub-'ject.' If one should give a Sum of Money, or any other valuable Consideration to another, for which Cause that other entails his Estate to himself, and the Heirs Male of his Body; whom failing, to certain other Substitutes; whom all failing, to the third Party, who gave the said valuable Consideration for the Substitution to be made upon him; It is on all Hands admitted, That such Substitution would be onerous, and as such, unalterable in Prejudice of him who gave the Consideration for it. If then, in Place of such third Parties giving a small Sum of Money to a Proprietar, for the Proprietars entailing his Estate on him in that Manner, we suppose, that the whole Estate entailed should proceed from the third Party himself, and that he should dispone his own Estate to another, and the Heirs Male of his Body; whom failing, to himself; It were surely most irrational to think, That such Entail were less onerous and unalterable by him, who receives the whole Estate in Virtue of the Entail, than it was in the other Case, with Respect to him who got only the Sum of Money for making of it. In short, when the whole Estate entailed, proceeds from one of the Substitutes, the Substitution of him cannot but be admitted rather more onerous, than where only a Part of it, or perhaps a small Sum of Money, is contributed by the Substitute, for having the Entail made upon him; insomuch, as in the one Case, the whole Estate is in Effect given by the *Substitute*, as the Price of the Substitution, whereas in the other Case, the *Substitute* does not perhaps give the tenth Part of the Value. Or, to take this Matter yet in other Words, it is already established, that the Import of the Deed, is to be governed by the presumed Will and Intention of the Maker: Can any Thing then be more evident, than that when a Man gives away his Estate with a Provision, that in a certain Event it shall return to himself, that his Intention should be no less strong, that the same should not be gratuitously disappointed, than where he had only contributed a small Matter for having a Substitution settled on him?

Objected against by the Marquis.

But here the Earl of *Dundonald* foresees, That before he go further, it will be proper to remove one general Difficulty, which the Procurators for the Marquis of *Clydsdale* endeavoured, in their Pleading, to throw in the Way. It has been already admitted, That a simple Substitution or Destination

dination of Succeſſion is alterable by the ſeveral Subſtitutes as Fiats: But then, ſays the Marquis, whilſt that Rule is admitted, it is, according to the preſent Doctrine, at the ſame Time deſtroyed; Becauſe Settlements of Succeſſion are for the moſt Part made, in this Way; To the Heirs Male of the Maker's Body; whom failling, to certain other Subſtitutes; whom failling, *to his own Heirs*, or, *to return to his own Heirs and Aſſignees*. And if this laſt Termination ſhould be reckoned onerous and unalterable, by by the firſt Inſtitute, and other Subſtitutes, there ſhould be an End to the received Opinion, that ſimple Deſtinations of Succeſſion, or naked Subſtitutions are of their Nature alterable.

The Earl's Anſ. to diſtinguiſh the *Subſtitution* from the *Inſtitution* of the Donor.

The Anſwer is eaſy: The Miſtake lies in the making no Diſtinction betwixt two Caſes which are widely different, and muſt therefore be carefully diſtinguiſhed, *viz.* 'When a Man deſtinates *his own Succeſſion*, or 'in other Words, ſettles a Succeſſion *to himſelf*; as where he reſigns in Favours of himſelf, and the Heirs Male of his Body; whom failling, to his own other Heirs, or to *return* to his other Heirs and Aſſignees. AND 'WHICH IS THE OTHER CASE, when he does not ſettle a Succeſſion of 'Heirs to himſelf, but diveſts himſelf of the Eſtate in Favours of others, 'and the Heirs of their Body; whom failling, *to himſelf*,' whereby neither the Donee, nor any of the Subſtitutes, can become Heirs to the Donor, but all the Subſtitutes, and among theſe, even the Donor himſelf, in Caſe the Subſtitution in his Favours happens to take Effect, muſt ſucceed in the Eſtate as Heirs to the Donee.

The Entail alterable when the Donor is inſtitute.

In the firſt of thoſe Caſes, there is nothing elſe but a ſimple Deſtination of Succeſſion; none of the Subſtitutes have given any valuable Conſideration to the Donor for the Subſtitution upon them; the Donor himſelf is Fiar, he retains the Right in himſelf, and only ſubſtitutes them as Heirs to him, which is only a gratuitous Deed; And as *he* is under no Reſtriction, but may alter at Pleaſure; ſo may all *his* ſubſtitute Heirs who ſucceed in his full Right of an unlimited Fee. For this is certain, that if the Subſtitution is not onerous and unalterable by the firſt Donee or Heir of Entail, neither is it with Reſpect to any of the ſubſtitute Heirs who ſucceed to him *in omne jus*, that is, in the Right as he had it.

The Entail not alterable when the Donor is only ſubſtitute.

But in the other Caſe, where a Donor directly diveſts himſelf of the Eſtate in Favours of another, and the Heirs of his Body; whom failling, to return to himſelf and his Heirs, the Donee becomes Fiar, and that not as Heir to the Donor, but as his Aſſignee; And therefore it is, that the Subſtitution of the Donor himſelf is not conſtrued a gratuitous Deſtination of Succeſſion in his Favours, but onerous and unalterable by the Donee, who is made Fiar, in as much as that Subſtitution is either the Cauſe, or a Part of the Cauſe of the Donee's getting the Fee ſettled on him, which therefore cannot be gratuitouſly defeated.

Clauſes of Return unalterable, as being onerous Subſtitutions.

That the Lords may be yet further ſatisfied, That as thoſe Clauſes of *Return* do of their Nature import a Prohibition to alter, ſo the ſame ſtands upon no other Foundation, than the Principles already laid down, *viz.*

viz. That they are onerous Subſtitutions; The Earl ſhall proceed further to confirm it, from the Authorities of our Lawyers, and from the Courſe of their Lordſhips Deciſions, as oft as the Caſe has been determined.

Supported by the Opinion of Sir John Nisbet.

And in the firſt Place, it cannot but deſerve ſome Notice, That it has even been made a Doubt amongſt our Lawiers, Whether in ſome Caſes, Clauſes of Return have not yet a much higher Effect, than has been here pled, namely; 'That they could not even be diſappointed by 'the Debts of the Diſponee'; as if one ſhould gratuitouſly diſpone a Piece of Land to a Perſon, and the Heirs Male of his Body; whom failling, to return to himſelf; A Caſe which is ſtated, and left as a Doubt by the learned Sir *John Nisbet*. † The Earl, it is true, does not pretend to carry this Point ſo far, yet he cannot help thinking the Obſervation is of uſe to ſhow what Notion our Lawiers always have had of a Clauſe of Return.

And the Authority of Sir George Mᶜ Kenzie.

The next Authority the Earl ſhall mention, is, that of Sir *George Mᶜ Kenzie*, which is in Point to the preſent Argument, in his little Treatiſe of Entails ††, where he ſtates the Difference betwixt *onerous and gratuitous Subſtitutions*; and as an *Example of the firſt* mentions a *Subſtitution with a Clauſe of* Return, and very diſtinctly explains the whole Matter: For upon looking into the Paſſage, the Lords will find, it is by no Means upon the Word *Return* that he lays it, but upon the *Onerosity of the Subſtitution*: for that tho' a Subſtitution be conceived by way of Return, yet if it ſhall appear the Subſtitute in whoſe Favours it is conceived gave neither Money or other Conſideration for it, or that the Eſtate it ſelf, did not flow from him to the Inſtitute after whom he is Subſtitute, in that Caſe it has no other Import than a common Deſtination.

And confirmed by Decrees of the Court of Seſſion.

But nothing can ſet this Matter in a clearer Light, than the current of Deciſions by the Lords of Seſſion, which the Earl is not here to plead on, as commonly Deciſions are adduced, only as parallel Caſes; which, in that View, however in themſelves juſt, often bring more of the Air of Authority, than Force of Conviction alongſt with them; but he is to make uſe of them in Confirmation of a Principle of Law, which to all Caſes of the ſame Nature muſt equally apply.

Decree in the Caſe, Drummond contra Drummond, in the 1679.

The firſt the Earl ſhall mention is, that of *Drummond* contra *Drummond* in the 1679. *Drummond* of *Riccartoun* granted two Bonds of Proviſion to two Daughters, payable to them and the Heirs of their Body; whom failing, to return to the Grantor which his Son ratified by a Bond of Corroboration in the ſame Terms. The two Daughters mutually aſſign'd their Bonds to each other, in caſe of their dying without Children; one of them died without Heirs of her Body, and the Surviver, as Aſſigny, ſued her Brother for the Portion of her deceaſed Siſter. *It was pled* for him, that the Aſſignment being for no onerous or neceſſary Cauſe, could not evacuate the Proviſion of *Return*. It was anſwered, That the Aſſignor was Fiar, and the Defendant only an Heir or gratuitous Subſtitute. *But obſerve the Reply* on which the Deciſion proceeded in Favours of the Defendant, 'That tho' he was Heir, and could not otherwiſe make up his

† Voce Return of Lands. †† Fol. Ed. Pag. 2.

'his Title than by a Service to the Assignor deceased; yet he was not 'simply Heir, but an *Heir of Provision*, who by Law has in him the mixed 'Character of Heir and Creditor; so that whilst as Heir he must represent 'his Predecessor as to his onerous or rational Deeds, as Creditor he can 'reduce all gratuitous Deeds to his Prejudice, in Virtue of the Act of 'Parliament 1621', *and accordingly the gratuitous Assignment was reduced.* But why was he Heir of Provision? Why was he Creditor? For no other Reason on Earth, but that *the Father's giving the Money to his Daughter was an* Onerous *Cause for* Substituting Himself. This may get other Names, it may be called the giving of the Right *sub modo*, or the giving it *sub conditione*, as it really is: But here must lie the Ground of Law, *That the Substitution of the Donor was an onerous Provision, which constitutes him a Creditor, who never can be gratuitously disappointed.*

For suppose this Bond not to have been a Donation by the Father, but to have been granted for Money, which had formerly belonged to the Daughter, the Clause of Return to, or Substitution of the Father the Grantor, would have been of no Effect, to bar the Daughter or her Heirs, from disposing of the Money at her Pleasure, because in that Case the Father would have been but a simple Heir substitute, who had given nothing; whereas in the Case of that Decision, he had given no less than the whole Money, as the Price of the Substitution.

Case of Murray against Murray, decided in the 1680.

And thus the Lords decided on this very Reason, the 18th *December* 1680, *Murray* contra *Murray*; Where a Debitor in a Sum of Money having granted Bond payable to his Creditor, and the Heirs of his Body with a Provision, that if he had no Heirs of his Body, it should accresce and belong to the Debitor himself. The Lords adjudged *this to be but a gratuitous Substitution, which the Creditor might alter* at his Pleasure. But observe the Reason given in the Decision, *unless an anterior Cause were shown*; for, could the Debitor have then said, that the Bond proceeded from himself gratuitously, or shown any other valuable Consideration for the Substitution, the Decision must have been directly the other way, because in that case, the Substitution would have been onerous and not gratuitous.

Case of Mortimer against the College of Edinburgh.

And the Decision 10 *December* 1685, between *Mortimer* and the College of *Edinburgh*, puts this Matter beyond all Doubt. A Bond was granted by a Mother to her Son, with a Provision, *That in case the Son should die without Heirs of his Body, the Sum should* return *to her and her Heirs.* The Son, who died without Heirs of his Body, assigned the Sum to the College of *Edinburgh*; and in Competition betwixt the College and the Executors of the Mother, it being pled for the Executors, that the Son's Fee was qualified with the aforesaid Provision, that failing Heirs of his Body, the Sum should return to his Mother, which he could not evacuate, even by this Mortification, tho' a Deed *ob piam causam*, as being voluntary and without an onerous Cause. The Lords went so far as to examine Witnesses, whether the Sum was originally the Mother's or the Sons, and it appearing to be the Mother's, *The Substitution was* adjudged *to be of that Nature, that it could not be gratuitously disappointed.*

But

Marquis objects, That Returns are unalterable with respect only to personal Estates.

But say the Procurators for the Marquis of *Clydsdale*, all those Decisions are in the Case of Obligations for Sums of Money, in which a *fideicommiss* is much easier presumed, than in the Case of Land Rights, because, say they, in Lands there must be an Investiture, otherwise the Lands upon Failure of the Heirs Substitute should become caduciary, or return to the Superior.

Answer for the Earl.

Is it not plain, That if this Argument were good for any Thing, it should prove too much, *viz.* That all Destinations of Money are unalterable by the Substitute, except for an onerous Cause; which for certain will not be pretended: The Distinction must then ly some where else; and 'tis believed there cannot another be found than this, *Whether the Substitution is onerous or not?* And if that is the Case, it equally applies to all Estates, whether in Land or Money; nay, if there is a Difference to be made, the Reason is yet stronger in the Case of Lands, than Sums of Money, which are more the Subject of Commerce, and not so easily restricted.

Supported by the Decision Duke of Douglas against Lee.

And this leads the Earl to lay before the Lords a fourth Decision, *Where even in the Case of Land Conveyances a* Return *was found to be an onerous Substitution, and to have the same Effect.* The Case is recent, as being between the Duke of *Douglas* and *Lockhart* of *Lee*.

The Marquis makes a Difference between that Case and this.

It was indeed alledged for the Marquis of *Clydsdale*, That there was this Speciality in that Case; that besides the Disposition which contained the Clause of *Return*, the Heir of the Family of *Douglas* had a Claim upon the Lands disponed, in Virtue of a Marriage Settlement in the Year 1630.

That Case is stated, and the Earl's Plea shown to be better than that of the Duke of Douglas.

But it will, at first View, be obvious to the Lords, that this Speciality is only an Amusement, when the Earl shall have fully stated the Case: By the said Marriage Settlement in the 1630, *William* Marquis of *Douglas* disponed his Estate to his Son *Archibald* Earl of *Angus*, and the Heirs Male of his Body, under a Prohibition to alienate, without Consent of his Father; but the said Earl, without his Father's Consent, did, in a second Contract of Marriage, convey the Lands of *Bothwell* and *Wendall*, to the Heir of that Marriage, who was afterwards created Earl of *Forfar*; for which and other Causes the Father, in vertue of the annulling Clause in the Contract, revoked that Settlement, and in the Year 1655 made a new one upon his Grandchild *James* Marquis of *Douglas*: But then in the Year 1659, this Marquis *James* grants a new Conveyance, of the saids Lands of *Bothwell* and *Wendall*, in Favours of his Brother the said Earl of *Forfar*: But that being done whilst he was under Age, he renews the Disposition after he was of Age in the 1669, *to his said Brother, and the Heirs Male of his Body; whom failing, to* return *to the Marquis himself, and his Heirs Male, and Successors whomever.* Notwithstanding whereof, the Earl made an Entail in Favours of *Lockhart* of *Lee*, but the Heirs Male of the Earl's Body failing, the Duke of *Douglas*, as Heir of the Marquis, brought an Action for voiding that Entail, as made in Prejudice of the foresaid Clause of *Return* and *Substitution* to the Marquis. And, as in vertue of the Disposition in the 1699, the Earl of *Forfar* had, at the Date of the Decision, which was in the 1717, possest near 50 Years; so, at that Time, there could

could for certain no Speciality ly in Favours of the Family of *Douglas*, from the old Contract in the 1630. But the Argument turned ſingly for the Duke of *Douglas*, upon the Clauſe of Return in the Diſpoſition 1669. Againſt which, it being pled for *Lockhart* of *Lee*, That the Clauſe of *Return* was no other than a gratuitous Deſtination, becauſe of the prior Right, in the Perſon of the Earl of *Forfar*, by the Diſpoſition 1659. *The Court of Seſſion*, " in Reſpect the Earl of *Forfar*'s former Rights might " have been quarrelled by Marquis *James*," *adjudged the* RETURN *in the Diſpoſition* 1699, *to be onerous, and which could not be diſappointed.* If then the Lords found a Subſtitution, in Favours of a Donor onerous, notwithſtanding of a prior Title in the Donee, becauſe that prior Right was, before granting the Diſpoſition, quarrelable by the Donor; Is it not a Demonſtration, that much more would they have done ſo, had the Diſponee had no prior Right at all, but that the Diſpoſition had gratuitouſly flowed from the Granter, who ſubſtitutes himſelf? Which is the preſent Caſe.

It was further pled for the Marquis, as a Speciality in this Deciſion for the Duke of *Douglas*, That there the Eſtate was an Appanage only given off to a younger Brother of the Family, as a Patrimony for him and the Heirs Male of his Body; That it was given for that Cauſe; and when that Cauſe failed, it was reaſonable it ſhould return, becauſe otherwiſe it would not have been given off the Family; which was not the preſent Caſe, where the Queſtion was about the Succeſſion to the whole Eſtate.

Marquis objects, That Returns operates only in Caſe of an Appanage.

But here we have another imaginary Diſtinction; Can any Mortal believe, that a Man has his Family more in View, *when* he gives off a Part of his Eſtate to a ſecond Son and his Heirs Male, with a Return, *&c.* who he hopes and wiſhes, ſhall have Heirs Male of his Body to enjoy it, and that his Family may never be the better for it, *than when* he diveſts himſelf of his whole Eſtate to his eldeſt Son, and the Heirs Male of his Body, *&c.* and provides a Return to himſelf, and the other Heirs Male of his own Body? *Is is not rather evident*, that the much ſtronger Preſumption lies the other Way? For, as at moſt he can but have the Bettering of his Family in View in the firſt Caſe; ſo he has the very Being and Preſervation of it in View in the other: *But ſtill indeed*, the whole Matter recurs to this, *that in either Caſe the Subſtitution is onerous, which therefore in both muſt have the ſame Operation.*

Earl ſhows, Returns operate more, when the whole Eſtate is ſettled.

And if one ſhall keep this Principle in their Eye, there can no Difficulty ariſe from what was further pled; and to the ſame Purpoſe, by the Procurators for the Marquis of *Clydſdale*, tho' ſomewhat in a different Shape. They told us, that where a Fee is conveyed to a ſecond Son, or to a Stranger, and the Heirs Male of his Body; whom failing, to the Granter, there the Return may be effectual; becauſe, in that Caſe, there is a Right of Credit or Obligation upon the Grantee, in Favours of the Grantor; yet, in as much as, no Man can be Creditor to his own Heir, the like does not hold, where the Right is given to the Heir of the Granter's own Body, and the Heirs Male of his Body; whom failing, to return to the Granter's other Heirs; for that is, ſay they, but a Deſtination of the Entailer's

Marquis objects, That Returns do not operate, when the Grantee is Heir of the Grantor.

tailer's own Succeſſion, and the laſt Termination no other, than the adding of the laſt Link to the Chain, which, as far as his Eye could go, he had carried by a particular Subſtitution.

Earl ſhows, that the Operation is the ſame, whether the Grantee be Heir or not.

But do not the learned Gentlemen here fall plainly into a wilful Miſtake? As if a Man could not give Right to a Perſon, who *ſhould have been his Heir*, and lay him under the ſame Obligation by the Acceptance of that Right, as he could have done, had he given it to a Stranger! Where a Man makes a Deſtination on himſelf and his Heir *qua* ſuch, with a Subſtitution, the Reaſoning is juſt, and ſo it has been admitted: But when he does not ſettle his Eſtate upon him *qua Heir*; but on the contrary, does it in ſuch Form, as he *cannot be Heir in the Eſtate*, and by diveſting himſelf in his own Time of the Fee, in Favours of his Son, and certain Heirs ſubſtitute; whom failing, to *return to himſelf, and other Heirs Male of his Body*, than thoſe he has named; the Ground of Law is preciſely the ſame, as if he had given that Right to a ſecond Son, or a Stranger, with a Return to himſelf: It was the Father's Intention the Son ſhould not ſucceed to him as Heir, he makes him Fiar in his own Time, and ſubſtitutes to him certain Deſcendants of his Body, but under a Limitation of Return to himſelf, and the other Heirs of his own Body; and if the Son had refuſed to accept of it in that Way, as it was in the Father's Power to have given it to another, it muſt be conſidered as a Condition of the Right; and the Right being accepted by the Donee under that Quality and Condition, he thereby covenants, and obliges himſelf to obſerve it. There ariſes a *pactum de non alienando*, from the Will of the Donor, and Conſent of the Donee joined together: And this Contract creates a Debt upon the Donee, whereof the Subſtitutes have the *jus crediti*, in vertue of which they are entitled to quarrel gratuitous Deeds made in Prejudice of it. And this indeed is to be noticed, as a *diſtinct Conſideration* in further Support of the Argument, which has been all along pleaded: And ſo far hath the Court of Seſſion been from regarding that Diſtinction, that in one of the Deciſions before-mentioned; namely, the Executors of *Mortimer* contra the College of *Edinburgh*, the Diſpute was concerning *a Bond taken by a Mother in the Name of her own Son, who was her Heir*; ſo that the Operation of the Return is of the ſame Force, whether the Settlement be made to an Heir, or a Stranger.

Earl anſwers the Objections for the Marquis, raiſed from two late Decrees, Scot of Tuſhilaw, and Ker of Chatto.

"Nor do the late Deciſions in the Caſe of *Broadmeadows* contra *Scot* of "*Tuſhilaw*, and that of *Ker* of *Chatto*, pled upon by the Marquis, occaſion "the leaſt Difficulty." For without reſuming the Fact in thoſe Caſes, the Lords may remember, that in *Broadmeadow's* Caſe, *there was no Queſtion at all about the Effect of a* RETURN, which 'twas on all Hands admitted, would have excluded any gratuitous Alteration, *but only whether there was a proper* RETURN in the Caſe: And it was adjudged by the Lords, *that there was not*. *Firſt*, Becauſe the Brother was the Donor, and the *Return* was provided not to him, but to the Father. *2dly*, Becauſe the Father was no Party to the Tranſaction, and it did not appear he ſo much, as knew of it. *3dly*, It was evident, there was no Deſign in the Thing to ſupport the Family, by joining the two Eſtates; for the Return

was

was to the Father and his Heirs Male, and his own Eſtate ſtood provided to Heirs whomever. And, 4*to*, The Alteration was not made by a gratuitous Deed, but by an onerous Deed, *viz.* a Marriage Settlement. *And there is yet leſs in* Chatto's *Caſe*, for there the Lands were conveyed firſt in Favours of the Donor himſelf, which, according to the Diſtinction before laid down, could be no other than a ſimple Deſtination of his own Succeſſion.

The foregoing Reaſoning applied to the Earl's Caſe.

And now the Earl humbly hopes there can be no Difficulty, in applying the forgoing Reaſoning to the preſent Caſe: For, as the ſeveral Settlements and Conveyances, from the firſt Earl of *Dundonald*, have been fully deduced, ſo the Earl in all theſe Settlements, diveſts himſelf in Favours of the Donees, and then ſubſtitutes himſelf after the Donees: The three firſt Deeds in the 1653, 1656 and 1657 bear the very Word *Return*; and tho' the other three are in the ordinary Stile of a Subſtitution; *whom failing, to himſelf*; Yet there can no Doubt remain, after what has been ſaid, but that all of them have the ſame Operation, as being onerous Subſtitutions on the Part of the Donor who gave the Eſtate, and ſo not alterable by the Donees, *viz.* *William* Lord *Cochran* his Son, and *John* Lord *Cochran* his Grandchild.

William Lord Cochran could not defeat the Return in the Settlement 1653, and far leſs could his Heirs.

Let the Caſe but be ſuppoſed; *William* Lord *Cochran*, after getting the Settlement of the Eſtate in the 1653, *to himſelf, and the Heirs Male of the Marriage; whom failling, to return to the Donor his Father*; as he happened to dy before his Father, that he had left no Iſſue Male of his Body; Would it not be the moſt ſhocking Thing in the World to imagine, *That a gratuitous Deed of his* would have diſappointed the *Return* to his Father and his Family, from whom the Eſtate proceeded? Or that ſuch could be thought to have been the Intention of Parties, even tho' there were not ſo much to be ſaid, from the ſolid Principles of Law already explained, why ſuch a gratuitous Deed ought to have been ſet aſide, as in Prejudice of the onerous Subſtitution of the Donor? And if he could not himſelf have prejudged it, ſure much leſs could the Subſtitutes who ſucceed in his Right.

And the Return in the Settlements 1656 & 1657 is ſtill ſtronger.

The Caſe of the Deed 1656 is yet ſo much the ſtronger, as it is by Way of mutual onerous Contract, betwixt the Earl of the one Part, and his Son the Lord *Coehran*, with Conſent of his Lady and her Friends of the other. The Son rediſpones to his Father the Lands of *Ochiltree*, and in Exchange, his Father gives him the Lordſhip of *Paiſley*, *Lands of far greater Value*, and ſtipulates a *Return to himſelf*. If this is not an *onerous Subſtitution*, it will be difficult to find an Inſtance of one in the World. AND, tho the third Deed, in the 1657, is only a Renunciation, of the Reverſion of Part of the Lands, which the Father had reſerved to himſelf in the Contract 1653; yet as this is likewiſe conceived in the Form of a mutual Contract, onerous on both Sides, the Son having on his Part undertaken 20000 *L.* of his Father's Debt; ſo it further concurs to ſtrengthen the Argument, *that the* INTENTION *of the* RETURN *therein likewiſe provided to the Father* was, *that the ſame ſhould import, not an* ambulatory, *but a* ſettled *Deſtination of Succeſſion.*

The Substitution in the Settlements 1680 & 1684 is onerous & of more Force than a Return.

When again we come to the Deeds 1680 and 1684, tho' we have not the Word *Return*, yet, from what has been said, it will be plain, we have the individual same Thing, *a Substitution of the Donor himself*, and the other Heirs Male of his Body after the Donees, on whom he had settled the Fee of the Estate, It is true, he had reserved pretty ample Power to himself over the Fee, by the Surrender and Charter in the 1680: but by the Deeds in the 1684 these are discharged, and the Fee absolutely settled upon the Donees, to whom he *substitutes himself*, whence the same Observation recurs, as to the whole Estate, which has been just now made from the Deed 1656, with Respect to the Lordship of *Paisley*, that *here was in the most proper Sense an onerous Substitution in a mutual Contract*. But the Earl cannot omit to add another Observation, That if the Marquis of *Clydsdale* will not allow an Entail to be unalterable, upon this Ground, that the whole Estate entailed proceeds from a Substitute; but only where the Maker of the Entail had one Part of the Estate belonging to him, and the Substitute Contributes another Part: Or in other Words, when one Person gives something to another, to get a Substition, of that other Persons Estate settled on him; Then the Earl is safe to join Issue with the Marquis upon the Footing of this Contract 1684: For *John* Lord *Cochran*, as apparent Heir to his Father, was entituled to the Lordship of *Paisley*, the Lands of *Dundonald* and others; the Earl his Grandfather again had still the Fee of a considerable Estate, besides the Faculties reserved to him by the Scettlement 1680; they join together and entail both their Estates to him the said *John* Lord *Cochran*, and the Heirs Male of his Body; whom failling, to the Earl's other Grandsons, and the Heirs Male of their Bodies, in Exclusion of their Daughters; and upon the Faillure of all these Heirs Male, the Earl and the other Heirs Male of his Body are substitute; What is this else, than *the Earl giving his own Estate to his Grandson, for the Grandson's substituting the Earl in both Estates*? So that tho' there had been no Provision at all in Favours of the Earl, in any of the former Settlements, yet this Settlement it self, would be sufficient for the present Earl of *Dundonald*'s Purpose. Surely had this Settlement been singly in a Contract between the Grandfather and Grandchild, and not in a Contract of Marriage, wherein it must be owned, as there was this, there was likewise another View; the Intention of Parties to make the Substitution unalterable, could not have admitted of the least Doubt: But, as it must be self evident from the Nature of the Thing, that there was actually a previous Treaty of this Kind between the Grandfather and Grandson, it cannot have the less Effect, that it is transfused into this Contract of Marriage; nay, with Submission, it ought rather to have the more Force, that it is made a Part of the Contract with the Lady, whose Interest it was, that the Heirs Female of the Marriage should have succeeded on the Faillure of Issue Male; and yet she is consenting *for herself, and for all the Issue of the Marriage*, that the other Substitutes should come in preferably to the Heirs Female of the Marriage.

But

But says the Marquis of *Clydsdale*, whatever might be the Case, were the present Competition between the first Earl *William* himself, or the other Heirs male of his Body, who are in the Provision of *Return*, and the gratuitous Grantee of the preceeding Substitute; yet the present Earl of *Dundonald*, who is only a simple Substitute, and not in the Provision of *Return*, can have no Title to it. Marquis objects the Earl is not Heir of the Return.

But surely his Lordship cannot be in earnest when he pleads this Argument. 'Tis humbly thought to be a Principle, *That wherever a Substitution is onerous in Favours of the last Termination, it gives the Force of a* fideicommiss *to the whole Destination*; and if it were otherwise this plain Absurdity should follow, that the Substitute, who was made preferable in the Succession, should have a weaker Right than he who was called after him; and in the next Place, he, who according to the Marquis's own Pleading would be the only onerous Substitute, and entitled to quarrel gratuitous Deeds, should have no Means left to him by which he could do it: For if once it is supposed that a Substitute, two or three Degrees before him, may and shall alien the Estate gratuitously in Favours of a Stranger, the Investitures are then changed; and it is not in Nature, that ever the onerous Substitutes can succeed in them. And if it should be said, that his Right of Succession would still remain to him on the former Investiture, yet, *first*, 'tis plain, he could not at the Time quarrel a gratuitous Deed, when many might be preferable to him in the Right of Succession. And, *next*, it should be a Jest to allow him to quarrel it, when that Succession should devolve by the Failure of the preceeding Substitutes, perhaps a hundred Years after they themselves had been divested, and when in all Probability the Provision of *Return* would be quite forgot, or cut off by a Prescription in Favours of thitd Parties. The Earl answers.

It must therefore be admitted as a Consequence, *That wherever a Substitution is onerous in Favours of the Heir in the last Termination, it is so likewise in Favours of the several preceeding Substitutes*; and this for certain is the Intention of the Donor, who makes a Substitution in that very View for the Preservation of his Family. *Nor can one suppose an Instance which shall bring this Matter nearer the Eye than the present Case*; the Earl of *Dundonald* conveys his Estate to his eldest Grandson and the Heirs male of his Body; whom failing, to his three other Grandsons *nominatim*, who all were in their Order Heirs male of his Body by his eldest Son; whom failing to himself and the other Heirs male of his Body: Surely no Man living can allow himself to think the Earl meant to give a stronger Right to *those other Heirs male* of his own Body, than he did to *the Heirs male* of his Body *in a nearer Degree*, and whom he had *nominatim* preferred in the Destination? And it has already been proved, that the Intention of Parties is the governing Rule by which this Matter must be judged.

After what has been said, the Earl judges it unnecessary to bring in Aid any Arguments from the Constitutions of other Nations, which tho' it is an approved Method of reasoning, where there is any Dubiety in a Point by our own Constitution †; yet there can be little Occasion for it on the Point in

† Craig Lib. 1. Dig. Oct. in fine.

in hand, when by our own Law and Custom it is so clearly established as a *Rule*, That a *Clause of Return*, or which is the same, *The Substitution of the Donor to his own Donees in the Fee*, cannot be gratuitously disappointed. And therefore, it shall only be observed in general, that if we look into the *Roman* Law, we find, that, whilst by reason of certain Subtilties, there could be no Substitutions at all, save the *pupillary* and *exemplary* Substitutions; that yet to avoid these Subtilties, *fideicommisses* were devised, and that those *fideicomisses*, which in Reality were no other than *our Substitutions*, were unalterable *for any Cause*. We have indeed in our Practice receded so far from the *Roman* Law, that Alienations for *onerous Causes* are never understood to be restrained, unless the Settlement be guarded by proper Limitations, and that even simple Destinations of Succession are alterable at Pleasure; but this is not to be further extended, when by the whole *Genius* of our Law, it is undoubted that there is a Difference betwixt a *simple* Destination and *other* Nominations, as before distinguished, tho' conceived in the same Words; and that *in those last, the* Institute *cannot prejudge the* Substitute *by any arbitrary* gratuitous *Deed*, tho' in simple Destinations *he may*, and the whole preceeding Argument applies to shew the Difference, and where the Ground of it lies. In *simple* Destinations the Donor *prospicit aliis* without any further regard to *himself*, than to appoint *his Successor*, the first Heir is in that Case the *persona maxime dilecta*, and left to his Liberty; in the other, the Donor so far further *prospicit sibi*, that he provides a *Return* to *himself* and his other Descendants.

The Import of Substitutions by the Civil Law.

The Import of Returns by the English Law.

If again we look into the Laws of these Neighbouring Countries, from whom we have derived our Feudal Constitutions, we shall find in all of them the same Distinction made. If we cast an Eye upon the *English* Statute, *De donis*, 2d of *Westminster in the Time of* Edward I. before, as is believed we had any Thing of Entails in our Custom, *we find* this very Distinction already established between *simple Destinations*, which they call *Remainders*, and *Returns to the Donor*, which they call *Reversions*; and that these are alterable at Pleasure, but *Reversions* are not; and this Statute is the more remarkable, that it proceeds upon this Preamble, *that such is understood to be the Will of the Donor in the* Reversions, *that they be not disappointed*. It is true, that by their Customs, Ways and Means have been fallen upon in *England* to defeat even these *Reversions*, by what they call *Fines and Recoveries*: which are no other than a Device for eluding the Law: Whereas there is no such Device allowed of by our Custom; *we have the same Law, but are unacquainted with the Devices to elude it*: The Will of the Donor is still the Rule with us, and we allow of Intention to explain Deeds: Whence the Question only comes to be with with us, If Provisions of *Return* infer an *Intention* of the *Donor*, that they *should not be disappointed*? And this very Statute of *England*, is a further Confirmation, that *Returns* do imply such *Intention*: For tho' as a Statute we have no Concern with it; yet by the Preamble of that Statute, it appears the Legislature of that Country understood these *Returns* to have that Effect.

If

If again we look into the Law of *France*, we ſhall find much the ſame Thing: They have what they call *Le droit de Retour*; and it would appear to be from our Commerce with them, that we have borrowed the very Expreſſion, the *Right of Return*, or *Clauſe of Return*. This *Droit de Retour* is with them either *Legal* or *Conventional*; The *Legal* is where *a Father diſpones his Eſtate to his Son, if the Son dy before the Father, the Eſtate* de jure *returns to the Father*. Which appears likewiſe to have been the *Roman* Law (*a*), tho' it is unknown in our Cuſtom: But then *le Retour Conventional* ſeems juſt to be our *Clauſe of Return*; and the Rule thereof is, That *le retour conventionel a ſon effect tel qu'il eſt regle par la convention ſoit entre aſcendans & deſcendans ou autres perſonnes* (*b*). Theſe Obſervations 'tis hoped the Lords ſhall not judge improper or impertiment; tho' the Truth is, they were the leſs neceſſary, that the Matter ſeems to be beyond Diſpute by our Law.

The Import of Returns by the French Law.

And thus the Earl having finiſhed this firſt Obſervation upon the Conveyances, for inferring the Will and Intention of the Granter, that the Succeſſion ſhould be unalterable, *viz.* from their containing a *Subſtitution to himſelf* or *Clauſe of Return*: He now proceeds to a *Second Obſervation*, which ſtrongly concurs to preſume and infer the ſame Intention; namely, that thoſe Conveyances are plainly calculate for *preſerving the Succeſſion to the Eſtate in the ſame Channel with the Honours of the Family*, which, in the Matter of Intention, is of no ſmall Weight. Thus the Entails 1680 and 1684, which are the only two ſubſequent to the obtaining the Patent of EARL, are to a Title calculated to anſwer the Limitation of Heirs in that Patent: As the Patent is *to the Heirs Male of the Earl's own Body; whom failing, to the eldeſt Heir Female of his own Body, aſſuming the Name and Arms of* Cochran; ſo theſe Entails are to his Four Grandſons *nominatim*, and "the Heirs Male of their Bodies, *who were all in their Order the neareſt* "*Heirs Male of his own Body*; and failing theſe to himſelf and the other Heirs "Male of his Body; whom failing, to the eldeſt Heir Female without "Diviſion, and aſſuming the Name and Arms."

Obſerv. 2. is brought from the Limitation of the Honours.

It has already been eſtabliſhed, that the *preſumed Will and Intention of the Granter is of equal Force with an explicite Prohibition*; and here there are a Variety of Circumſtances concurring, and all ariſing from the Face of the Deeds, which muſt neceſſarily carry a Conviction *that ſuch was the Intention*.

Why were all thoſe Particularities thrown into the Concluſion of ſo long a Chain of Settlements? This would go far even in a common Caſe, to ſhow the Grantor meant ſomething elſe than a common alterable Subſtitution: But then one can never help thinking, *That there is a great Speciality in the Caſe of a* Perſon *poſſeſt of an heritable* Honour *and* Dignity, *and carrying down the Succeſſion of his Eſtate, thro' the ſame whole Series of Heirs, who in the Courſe of the Patent muſt inevitably bear his Name and Honours*. Authorities might be brought to ſhow, That even laying aſide thoſe Particularities, this ſingle Circumſtance, *That there is a Dignity to be ſupported*, will explain the Intention

(*a*) L. 6. ff. de jure dot. l. 4. cod. ſolut. matrim. l. 2. cod. de bon. quæ lib. (*b*) Domat loi civil. part 2. liv. 2. tit. 2. ſect. 3. Pag. 3. and 5.

on of a Deſtination, different, from what the Import of it ſhould be by common Rules. To which Purpoſe the Lords may caſt an Eye on a Paſſage in the ingenious *Domat*, in his *Loi civile dans leurs ordre naturel, Tit. Subſtit. Direct. Sect.* 2. *N.* 9. And many other Authorities might be brought to to this Purpoſe, *That vir nobilis naturali impulſu nil majus deſideraſſe credendus, quam ſua familiæ fovere, eamque propagari & conſervari* (a). And to the ſame Purpoſe the afore-mentioned Deciſion betwixt Earl of *Hume* and *Coldingknows* naturaly enough applies.

Arg. drawn from Obligation on Females to aſſume Name and Arms.

But then there is another Speciality here to be noticed, *That the Heirs Female, who are the laſt in the Termination, are obliged to aſſume the Name and Arms*; which by all Lawiers is agreed upon, as one of the ſtrongeſt Evidences and Preſumptions of the Will of the Anceſtor, that his Succeſſion ſhould not be altered, *Quando teſtator deficientibus maſculis extraneum inſtituit, cum onere ferendi nomen, arma & inſignia ipſius teſtatoris familiæ, evidens eſt conjectura quod ipſe teſtator voluerit familiam ſuam conſervari, & perpetuam familiæ fideicomiſſum induxere* (b). And the Reaſon of this Preſumption is obvious: For to what Purpoſe ſhould a Man appoint Perſons of another Name, or his Heirs Female, to aſſume his Name and Arms, were it not for Preſervation of his Family and Memory? *And to what Purpoſe were all this Anxiety, if they ſhould have it in their Power, to alter the Succeſſion at their Pleaſure.*

Under an Irritancy.

Neither can it eſcape Obſervation, That theſe Heirs Female, who are appointed to aſſume the Name and Arms, *are laid under an* Irritancy, *and loſe the Eſtate in Caſe of Contravention*; *a* CIRCUMSTANCE, with which a Power of Alteration was incompatible and inconſiſtent.

Did the Argument for the preſumed Intention reſt upon any ſingle Ground, Invention might ſuggeſt Diſparities in particular Caſes taken ſeparately; but where all the various Preſumptions of ſuch Intentions concur jointly in one Caſe, it ſhould, with Submiſſion, ſeem impoſſible to evade the Force of them; eſpecially, when it is added, *That the Founder of the Family*, about whoſe Intention the preſent Queſtion is, *ſtood out againſt any Alteration of the Succeſſion, even in the Marriage Settlement between his Grandſon, and the Daughter of the firſt Family in the Nation.* And when it is further added, *That as he gave ſeparate Land Eſtates to* William *of* Kilmaronnock, Thomas *and* Alexander Cochrans *his other Grandchildren for their Patrimonies; ſo he conceived the ſeveral Settlements thereof, with a Proviſion of* Return *to himſelf and his Heirs Male, upon the Faillure of Heirs Male of the Bodies of theſe Grandchildren,* which ſhows the anxious *Intention* he had to preſerve his *Eſtate* in the ſame *Channel* with his *Honours.*

Marq. Object. 1. from the Renunciation 1684.

And now to finiſh this firſt and general Point of the Earl's Declarator and Defence, it remains only, that the Earl make Anſwer to the Objections brought againſt him from the Settlement 1684. And, *Firſt*, It was ſaid, That if there was a Clauſe of *Return* in the preceeding Deeds, it

(a) Zaſ. conſil 2. n. 13. in fin. n. 14. Mantica de conject. ult. volunt. lib. 6. tit. 15. n. 1. &c. (b) Guid. Pap. deciſ. 467. Menock. de præſumpt. 5. 68. 1. 13, 14. Knipſchildt de fideicom. famil. nobil. c. 6. n. 126.

it was discharged, by Earl *William* the First his Renunciation at that Time. *2dly*, Great Weight was laid on a Clause in the Marriage Settlement 1684, whereby *John* Lord *Cochran* obliges himself, *That he shall never do any Fact or Deed, to prejudge the Heirs Male to be procreate of that Marriage, to succeed to him in the foresaid Lands and Estate, by preferring the Heirs or Children to be procreate of any other Marriage to the same*; But Prejudice *always to the said* John *Lord* Cochran, *as Fiar of the said Estate, to contract Debts, or sell and dispose upon any Part thereof for any other Cause, as he shall think fit.* By which it was pretended, that the whole Argument, from an onerous Substitution and Intention of a Donor, fell at once to the Ground, seeing here *John* Lord *Cochran* was declared to be at absolute Freedom, except that he could not prefer Children of a second Marriage to the Succession. Marquis Obj. 2. from a Clause in Marriage Settl. 1684.

'Tis answered to the *First*, That the Renunciation is singly of the Powers and Faculties, which were reserved to Earl *William* the First, to *sell* and *burden*, &c. by the Settlement 1680, and to redeem a Part of the Lands by the Settlement 1653; but has no Manner of Reference to the Clause of *Return*, or *Substitution* of himself: On the Contrary, the separate Deed of Renunciation granted of the Date of that Marriage Settlement, and for Performance thereof, is not only granted to the Lord *Cochran*, and the Heirs Male of his Body; but specially to all the other Heirs of *Entail and Provision mentioned in the Marriage Settlement*, which is the same Thing, as if he had ingrossed the *whole Substitution*: Nay, with Submission, 'tis more, in as much as, by this Reference to the Substitutes, he calls them, Heirs of Entail. There is an *Emphasis in the Expression*; for, however an *Entail* be a general Term, comprehending all Destinations of Succession, whether under Limitations or not; yet, in common Acceptation, an *Entail* is generally understood to *imply something of a Limitation.* Earl Ans. to Object. 1.

And as to the second Objection, from the foresaid Clause in the Settlement 1684, it will be plain, at first View, that it imports no more, than *that* John *Lord* Cochran *might contract Debts, and sell or dispone for any* onerous *or* rational *Cause*, other than, *in Favours of the Children of a seccond Marriage, in the same Manner, as if that Restraint of disponing to Children of a second Marriage, had not been insert*; for, if the Argument for the Marquis proves any Thing, it proves a great Deal too much. The Estate by that Settlement, was provided in the first Place to the Heirs Male of the Marriage, who, for certain, were thereby so far Creditors, that their Father *John* Lord *Cochran*, could not disappoint them by a gratuitous Deed; but if the reserving Clause, or *but Prejudice*, which is annexed to the *Restraint* upon him from disponing to Children of a second Marriage, should be found to import an unlimited Power of Disposal in all other Cases, even gratuitously; the Consequence would be inavoidable, that he might dispone gratuitously in Prejudice of the Heir of the Marriage, which the Marquis will own were absurd: For it seems, with Submission, to be impossible, to separate the Import of this Clause, as to the *other Substitutes*, from the Import of it, as to the *Children of the Marriage*: A Thing so clear, that the Earl should not have given the Lords the Trouble of any Observation, Earl Ans. to Object. 2.

on, in further Confirmation of it, had not the Lawyers for the Marquis thought fit to plead, that this Clauſe, *but Prejudice*, related only to the other Subſtitutes; and was ſo to be underſtood, that *John* Lord *Cochran* might for any, however gratuitous Cauſe, alien in their Prejudice. But can there be any Thing more plain, than that the Clauſe, *but Prejudice to diſpoſe for any other Cauſe*, muſt reſpect the *ſame Heirs*, who are mentioned in the reſtraining Clauſe, to which it is ſubjoined? That is, *the Heirs of the Marriage*, in whoſe Prejudice he was reſtrained from diſpoſing in Favours of the Children of a ſecond Marriage, and to which the *But Prejudice* ſubjoined, allowing him to diſpoſe for *any other Cauſe*, muſt either be underſtood of *any other onerous or rational Cauſe*; Or otherwiſe the whole Clauſe ſhall be rendred ridiculous: *For the Husband ſhould thereby have been reſtrained, from giving any Part of the Eſtate, to Children of a ſecond Marriage; and yet, at the ſame Time, ſhould have had Power to diſpoſe of the whole Eſtate, even gratuitouſly to any other Mortal*: Which is inconſiſtent, and therefore not to be imagined.

In ſhort, the Occaſion and Import of the whole Clauſe muſt have been plainly this, that, by the Nature of the Settlement, *John* Lord *Cochran* the Husband, or the other Subſtitutes, could do no gratuitous Deed in Prejudice of the Subſtitution: But the Lady and her Friends foreſaw, that this was no Reſtraint, againſt an Alienation to Children of a ſecond Marriage, which in Law is reputed a *rational* Cauſe; and they conſidered, that in the Event of the Lady's Predeceaſe, ſhould that have fallen out, it might readily happen, that the Husband would alienate a Part of the Eſtate by a ſecond Marriage Settlement; and therefore it was they took Care to guard againſt it, by a reſtraining Clauſe, to which *Reſtriction* there is a BUT PREJUDICE, *&c.* ſubjoined, that is, BUT PREJUCICE to that particular *Reſtriction*, but by no Means to the Import and Effect, which the Deed ſhould, of its Nature, have had, if that *Reſtriction* had not been inſert: This *but Prejudice* is no other, than a *Reſervation* or *Exception*, which *nihil novi juris tribuit*; ſo that the Matter comes back ſtill to the former Queſtion, *Whether, if this Clauſe had not been inſert, the Deed it ſelf did import a Prohibition, againſt gratuitous Alienations in Prejudice of the Subſtitution?* Which, if it did, then this *but Prejudice* annexed to a particular *Reſtriction*, can never be interpreted, *to rear up a Right in the Perſon of the Lord* Cochran, *deſtructive of the very Import of the Deed.*

Earl's 3. Defence, That the late Earl had not a legal Title.

Having thus, as 'tis hoped to the Lords Satisfaction, eſtabliſhed the firſt Point, 'That it was not in the Power, of either of the Earls *John* 'or *William* laſt deceaſed, by a gratuitous Deed, to alter the Succeſſion;' The Earl proceeds to the NEXT POINT of his Declarator and Defence, viz. *That in ſo far as concerned certain Parcels of the Eſtate, the gratuitous Deeds of Alteration*, under which the Marquis claims, *muſt be declared ineffectual, as granted by Perſons, who, with Reſpect to theſe Parcels of the Lands, were only in the State of apparent Heirs.*

Recital of Ld. Cochran's Title by Inſeſtment, to a Part of the Eſtate.

It has been already obſerved, That in the Year 1653, *William* the firſt Earl of *Dundonald* had, in his Son the Lord *Cochran*'s Marriage Settlement, *diſponed to his Son, and the Heirs* MALE *of the Marriage*, the Lands

of

of *Dundonald, Ochiltree, Cochran, &c.* In virtue whereof, *the Lord Cochran was infeft in theſe Lands*, and his Infeftment recorded in the Regiſter for the County of *Air*; AND THAT in the Year *1656*, there was a *Contract of Excambium* between the Earl and his Son, by which his Son re-diſponed to him the Lands of *Ochiltree*, to which the Son had an irredeemable Right by the foreſaid Marriage Settlement; and in Lieu whereof the Earl, by Way of Exchange, diſponed to his Son, *and the Heirs* MALE *of his Body, &c.* the Lordſhip of *Paiſley* and Lands of *Glen*; and whereby the Earl obliges himſelf, *to procure his own Infeftment of the ſaid Lordſhip confirmed, and then to infeft his Son and his foreſaids therein, to be holden either of the Earl himſelf, or of the Superior*: And for further Security, conveys to him the Procuratories of Surrender, granted to himſelf by the Earl of *Angus*, and others the former Proprietors; as alſo grants a Procuratory of Surrender, and Precept of Saſine. By virtue of which Precept the Lord *Cochrane* was infeft, and his Saſine duly recorded, in the proper Regiſter of the County where the Lands ly. AFTER this, there were certain other Lands purchaſed by Earl *William* the I. *to himſelf in Liferent only, and to the ſaid Lord Cochran and the Heirs* MALE *of his Body in Fee.* And tho' all thoſe ſeveral Lands beforementioned, were thus habily veſted by Infeftment, in the Perſon of the ſaid Lord *Cochran*, and the Heirs Male of his Body; yet to this Day none of the later Earls, Deſcendants of the Lord *Cochran's* Body, have ever made up any Title to theſe Infeftments; *To which therefore, the preſent Earl of* Dundonald, *as the neareſt Heir Male of his Body, has the only Right.*

To which the late Earl made up no Title, and the preſent Earl has now Right.

It was objected for the Marquis of *Clydſdale*. *1mo*, That Earl *William* the firſt, had, by *Deed* in the Year 1680, reſigned thoſe Lands to *John* Lord *Cochran* his Grandchild, eldeſt Son and apparent Heir of the ſaid *William* Lord *Cochran*, upon a Recital, *That he had in the Rights, formerly made by him to his Son, reſerved to himſelf a Power to alter*; whence it was to be preſumed, that there had been at that Time, ſuch Powers in ſome perſonal Deeds, which had afterwards been delivered up by the Earl.

Marq. Object. from the Recital in the Surrender 1680.

But this Objection ſcarce deſerves to be noticed. It were very dangerous to preſume, *That a Man had Powers*, to defeat a Right, formerly granted by him, *Becauſe he thought fit to ſay ſo*. But next, as the Preſumption would in any Caſe be unnatural, ſince generally where there are ſuch Powers to alter a Deed, intended to be reſerved, they are ingroſſed in the Deed it ſelf: So, in the third Place, the Contrary of this Preſumption, in this Caſe, is apparent, *not only* from the Contract *1653* and *1656*, wherein ſuch Powers, as were intended to be reſerved to the Earl, are ſpecially expreſſed, and from the Renunciation *1657*, wherein thoſe Reſervations are formally diſcharged; but alſo from the ſaid *John* Lord *Cochran's* Marriage Settlement 1684, wherein, as is before obſerved, *The Lord* Cochran *is taken bound, to make up Titles to thoſe Lands that ſtood in his Father's Perſon*.

Earl's Anſwer.

It was objected in the ſecond Place, That, in as much as the Earl had in the Year 1680 ſurrendred the ſaid Lands, in the Hands of the Superior, for new Infeftment thereof to *John* Lord *Cochran* his Grandchild, *&c.*

Marq. objects Preſcription.

in Vertue whereof he was infeft, and on the Footing of which Infeftment, the Family have poſſeſſed downwards to the Death of Earl *William* in the 1725; That therefore, any Claim the preſent Earl could have as apparent Heir of the Infeftments, which ſtood in the Perſon of *William* Lord *Cochran* his Grandfather, was loſt both by the negative and poſitive Preſcription,

Earl's Anſ. 1. But to this the Anſwers were likewiſe obvious: For, in the *firſt Place*, Earl *William* having reſerved his own Liferent in the Conveyances of theſe ſeveral Lands; Tho' there were otherways *termini habiles* of Preſcription, of which afterwards, yet that Preſcription could only commence from the Death of the Earl, whoſe Liferent was reſerved in the ſeveral Conveyances; and he having deceaſed no ſooner than *November* or *December*, in the Year 1685, therefore the 40 Years which are neceſſary to make a Preſcription, had not expired, when the preſent Earl brought an Action of Declarator of his Right; *ſo that there is truly no Preſcription*, becauſe there has not been 40 Years Poſſeſſion.

Anſwer 2. *2do*, Tho' there had been Poſſeſſion from the Year 1680, *yet the Years of the Poſſeſſion of Earl* William *the firſt, the Liferenter, behoved to be deduced*, becauſe, whilſt he lived, the preſent Earl, the Heir of the Lord *Cochran*'s Infeftments, was *non valens agere*, which is a Principle in the Matter of Preſcription: And ſo the Lords have, by a Courſe of uniform Deciſions, adjudged in ſo many Words, *That Preſcription cannot run againſt the Fiar during the Life of the Liferenter* (a): Nor does it make any Difference, 'That in thoſe Caſes, the Right made uſe of as the Title 'of Preſcription, was given to a Stranger by the Liferenter formerly de-'nuded of the Fee; whereas here it is given, to the apparent Heir in 'the Fee by the former Infeftment:' For ſtill the Reaſon is the ſame, *That the Preſcription cannot run, in Prejudice of the Subſtitute in the firſt Infeftment.*

Anſwer 3. Which leads to a third Anſwer, That there can be no Preſcription in this Caſe, becauſe, *as well* that Title *to which the Preſcription is aſcrived, as* that Title *under which the preſent Earl claims, were both in the ſame Perſon*; for as *John* Lord *Cochran* was infeft upon the Settlement 1680, ſo he was apparent Heir of his Father's Infeftment, and poſſeſt by Virtue of both Titles; And upon this *medium*, the Argument for the Earl of *Dundonald* goes yet higher, *That no Preſcription could run, but from the Death of Earl* William *laſt deceaſed, who was the apparent Heir of the Lord* Cochran, *and was in Poſſeſſion of the Eſtate*; and which Apparency was really the only good Title of Poſſeſſion, as appears to have been the Opinion of the Court, in a parallel Caſe, 13 *December* 1705, *Livingſton* contra *Menzies*. But the Earl has yet this much more to ſay, that it is evident *John* Lord *Cochran did even aſcribe his Poſſeſſion to that Title*, in as much as in the Marriage Settlement 1684, and after he ſtood infeft upon the Settlement 1680, he acknowledges the Title of his Poſſeſſion to be his Right of apparent Heir to his Father, when by a Clauſe in that Settlement 1684, he becomes ſpecially bound

(a) Ult. Feb. 1666, Earl Lauderdale againſt Viſ. Oxford. Jan. 17. 1672, Young againſt Thomſon. Feb. 5. 1680, Brown againſt Hepburn.

bound *to make up his Title as Heir to his Father, in the Lands wherein his Father was infeft:* And if this ſhould have but the Effect, which the Earl begs leave to think it cannot miſs of, *viz. to aſcrive* John *Lord* Cochran's *own Poſſeſſion to his Apparency,* it is enough to defeat the Preſcription.

Anſwer 4. In the laſt Place, as there can be no *termini habiles* of Preſcription, but where one Line of Heirs have poſſeſſed upon a Title, excluſive of another Line of Heirs, which is not the Caſe here, ſeeing the Male Line has been ſtill in the Poſſeſſion; *So in all Events the Minority of the preſent Earl,* which from all Preſcription muſt be deduced, *is ſufficient to interrupt the Preſcription.* Nor is it neceſſary upon this Point to notice certain Arguments brought on the Part of the Marquis of *Clydſdale,* 'Why, in this Caſe, the 'Earl could not even plead his own Minority, to interrupt the Preſcripti-'on'; becauſe it will be obvious, that either it muſt be competent to him to plead it, or there can be no *termini habiles* of Preſcription at all; for nothing can be more certain than this, *That there cannot be a Preſcription, unleſs there is ſome Perſon againſt whom that Preſcription runs:* And for this Reaſon indeed it is, that it has been already ſaid, that in the preſent Caſe there could be no Preſcription, becauſe the very Perſon entitled to the Infeftment, ſaid to be loſt by the Preſcription, was in Poſſeſſion by Virtue of it. But then *if it did run againſt the preſent Earl,* the Conſequence muſt be, *that his Minority falls to be deduced.*

Marq. objects a baſe Infeftment, not clad with Poſſeſſion It was objected for the Marquis in the third Place, That *William* Lord *Cochran*'s Infeftment in the Lordſhip of *Paiſley,* was only a *baſe* Infeftment, holden of his Father the Grantor, and not cled with Poſſeſſion, and as ſuch was null by the Law at that Time; and that therefore the poſterior Infeftment, upon the Surrender of the ſame Grantor in the Year 1680, is the preferable Right, to the Lands of *Dundonald* and *Cochran* contained in the Settlement 1653, and to the Lordſhip of *Paiſly* contained in the Settlement 1656.

Earl's Anſ. 1. It is anſwered, 1*mo.* 'Tis *a Miſtake in Point of Law,* 'That it was a 'Nullity in *baſe* Infeftments, not to be cled with Poſſeſſion'; For even before the Statute 1693, they were to all Effects valid Rights, excepting only in Competition with poſterior onerous Publick Infeftments, or ſuch *baſe* ones, *as implied Warrantie,* and got the firſt Poſſeſſion: They were Titles to force Production of all Infeftments, whether publick or private; they excluded poſterior Arreſters; they excluded the Terce of the Grantor's Relict; they were good in Competition with poſterior gratuitous Rights, flowing from the ſame Author (*a*). In ſhort, *they were good to all Effects, except in Competition with the foremention'd onerous Rights;* as is plain from the expreſs Words of the Act of Parliament 1540, which firſt introduced the Diſtinction, between *baſe* Infeftments not cled with Poſſeſſion, and poſterior *publick* Infeftments: Before that Law, it was a common Thing for Men to infeft their Children in their Lands, and retain the Poſſeſſion themſelves, and thereafter ſell the ſame Lands to a Stranger, who knew nothing of the prior Infeftment, Regiſters not being then introduced

(a) Stair lib. 2. Tit. 2. Par. 27. Jan. 27. 1669. Bell againſt Laurence Rutherford. Spotiſwood, voce Kirkmen.

ced; and who, by that Means, had for the moſt Part, only a fruitleſs Action on the Warranty for recovering the Price; To remeid this Inconveniency the Act of Parliament 1540 PRESUMED, and ſtatuted upon the PRESUMPTION, *That whoever took a* baſe *Infeftment, and allowed the Grantor to retain Poſſeſſion, did the ſame* ex fraude, *to induce a poſterior Purchaſer to give a Price for the Lands*; and therefore *Statutes*, 'That Perſons having ſuch *baſe* Infeftments, ſhall not be heard againſt a ſecond heritable Poſſeſſor, by any 'Title *which implies Warranty*': This is all that the Act provides, or needed to provide, there being no Place for ſuch Preſumption of Fraud, in the Caſe of a poſterior *gratuitous* Infeftment; wherefore, even after this Act of Parliament, *the* baſe *Infeftment of* William *Lord* Cochran, *tho' it had not been cled with Poſſeſſion, was preferable to the poſterior* gratuitous *Infeftment, granted to* John *Lord* Cochran *in the Year* 1680.

Anſwer 2. But 2*do*, *Even* baſe *Infeftments, tho' not cled with Poſſeſſion, were always good againſt the Heir of the Grantor*; for by the ſame Statute 1540, albeit they are declared *not good in* the foreſaid *Competition*, yet they are, by an expreſs Clauſe, allowed to be *good againſt the Granter and his Heirs*. Suppoſe then, *John* Lord *Cochran* had ſerved Heir to his Grandfather Earl *William* I. he could not have quarreled this Infeftment: But ſo it is, he was in the preciſe ſame Caſe, as if he had been ſerved Heir to him: For, as he was his Grandfather's apparent Heir in the Year 1680, at which time, he accepted of a Diſpoſition from him to that Part of the Eſtate, which had not been formerly diſponed, to *William* Lord *Cochran* his Father; ſo he became equally liable to fulfil his Grandfather's Deeds, *preceptione hæreditatis*, as if he had been ſerved Heir to him.

Anſwer 3. 3*tio*, It is humbly thought, That *this* Baſe *Infeftment was a good Right in the Perſon of* William *Lord* Cochran, *even in Competition with any poſterior, however* onerous *Right, flowing from the Grantor*: In as much as, the Granter having reſerved his Liferent, the Liferenter's Poſſeſſion was in the Eye of the Law, the Poſſeſſion of the Fiar, as has been already noticed. There was indeed a Diſtinction made in this Caſe, by the Procurators for the Marquis of *Clydſdale*, 'That however the Liferenter's Poſſeſſion be 'reputed in the Eye of the Law, the Poſſeſſion of the Fiar, where the 'Liferent flowed from the Fiar,' as in the Caſe of a Wife's Liferent, her Poſſeſſion will be the Poſſeſſion of the Husband's Heir in the Fee, 'yet 'that the ſame did not hold, where the Fee flowed from the Liferenter, 'who retained the Poſſeſſion;' For which Diſtinction the Lord *Stairs* was appealed to. † But the Earl of *Dundonald* appeals to the ſame Citation from that learned Author, where we find *that Diſtinction only holds, where there are Grounds of Simulation or Connivance*, other *than Want of Poſſeſſion*. But in the preſent Caſe, *John* Lord *Cochran* could alledge no ſuch Pretence, whileſt in his Marriage Settlement 1684, he obliges himſelf to make up Titles to that ſame Infeftment.

Anſwer 4. But in the laſt Place, *The Infeftment of the Lordſhip of* Paiſley, *upon the Contract* 1656, *was in the moſt proper Senſe cled with Poſſeſſion*: For in that very Contract, wherein the Liferent of the Lordſhip of *Paiſley*, is reſerved

† Lib 2. Tit. 2. p. 209. in fine.

ved to Earl *William* the first, *there is excepted from that* Reservation, *a certain Part of the Lands, whereof the Lord* Cochran *his Son, was to get immediate Possession for his Aliment.* And it is hoped, That the Lords will be of Opinion, that it does not need a Proof, that he actually attained the Possession, of a Subject that was given him, as a Part of his Interim *Aliment* during his Father's Life; But that the same will be presumed *in re tam antiqua*, from the Tenor of the Deed, and Nature of the Thing.

The Argument upon this Objection, *That the Infeftment was a* base *one*, has hitherto proceeded on the Part of the Marquis of *Clydsdale*, as if *William* Lord *Cochran*, who got that Infeftment, had been a Stranger; and it is hoped, the Answers that have been made are satisfying. But next, *upon this same Topick*, of its being a *base* Infeftment holden of Earl *William* the first, the Grantor, there was an Argument pled for the Marquis in another Shape: *And it was alledged*, That as *John* Lord *Cochran* was apparent Heir of his Father, *William* Lord *Cochran*, in the *base* Infeftments, and might have made up a Title to them by a Service; so there was nothing to hinder him to take another Method for establishing a Title to the Lands in his Person, by taking a new Infeftment from his Grandfather, who had the *jus directum* in *his* Person, and which new Infeftment sopited the former *base* Infeftment: And it was pretended, That this was rather the eligible Method in this Case, because of the Defect that was in *William* Lord *Cochran*'s Infeftment, by Reason of its being *base*, at least there were none, who could quarrel his Son's taking that other Method.

Marq. objects the publick Infeft. gave a Title to the base Infeft.

It is believed to be the first Time, and it is hoped the Lords Decision shall make it the last, that ever it shall be pleaded, That an Infeftment upon a Surrender by the *Superior* gave a Title to an Infeftment of the *Property*, which stood in the Person of another, without the Intervention of any Deed by that other. The *Superior* surely *has no Title to the Property*; Nor is it possible, *That a Superior's Surrender can transfer a Right that is not in him.* Neither does it in the least alter the Case, that the Superior's Surrender, in the present Question, was in Favours of the apparent Heir of the Vassal: For *the apparent Heir's taking Infeftment on that Surrender, gave him no more Right to the Property, than if the Surrender had been made to a Stranger*; he became thereby Superior, it is true, but *he remained still only apparent Heir of the Vassal, as to the Property*; and thus after the Acquisition of the Superiority, was himself no more than the *apparent Heir* of his *own Vassal.* There was something more to be done to make a Title to the Property, *he must thereafter have served, and infeft himself as Heir to the Vassal*, or perhaps he might have done it on a Precept of *clare constat*, granted by himself in his own Favours; but *without such Infeftment, the Property remained* in hæreditate *of* William *Lord* Cochran, *the last Vassal, to be taken up by his next apparent Heir, who is the present Earl of* Dundonald.

Earl's Ans. 1.

Nor are the known and fixed Forms, of Transmission of Property, whether *inter vivos, or from the Dead to the Living*, ambulatory and pre-

Ans. continued.

precarious, to be obſerved or not, as one pleaſes; becauſe they have their Foundation on *Principles*, viz: *That Property cannot be* conveyed *but by Inſeſtment, nor one Inſeſtment* tranſmitted *but by another.* And here it is, That the whole Reaſoning for the Marquis of *Clydſdale* fails; His Lordſhip ſeems to confound two Things, *to wit, an Inſeſtment in the Lands*, flowing from the Superior, *and the Tranſmiſſion of the Inſeſtment*, which the Superior had before given. *John* Lord *Cochran*, it is true, *obtained an Inſeſtment* in the Lands upon the Superior's Surrender; *but by no Means*, ſuch an one as could *tranſmit the Inſeſtment*, that ſtood in the Perſon of the deceaſed *William* Lord *Cochran* his Father; which yet was neceſſary to be done, by all the Forms that ever have been known or deviſed, for tranſmitting to an apparent Heir, the Right and Title, which ſtood in the Perſon of his Anceſtor: For tho' *John* Lord *Cochran* had taken a Confirmation of his Father's Inſeſtment from the Crown, which he might have done, and thereby compleated his Right, both to Property and Superiority, without any Intervention or Deed of his Grandfather the Superior, ſeeing his Father's Inſeſtment had proceeded upon a Precept *a me* and *de me*, yet even to compleat that Right, he muſt have ſerved Heir in ſpecial to his Father, and inſeſt thereon: *So that ſtill it appears an Inſeſtment was neceſſary to tranſmit the former Inſeſtment.*

Anſ. continued. Neither does it make the leaſt Difference in the Matter, tho' the baſe Inſeſtment had not been cled with Poſſeſſion: For, *as the Lords will be ſatisfied* from what has been ſaid, *that it really was cled with Poſſeſſion*; and therefore as compleat a Right to the Property, as a Vaſſal could be poſſeſt of: *So tho' it had never attained Poſſeſſion, that ſhould have made no Odds in this Queſtion.* Still it was *a Right* in the Perſon of the *deceaſed Anceſtor*, whereof he was *not diveſted*; therefore it remains *in hæreditate*, there is not a *Medium*, till an *Heir* ſhall *make up a Title* to it: Nay, it was even in that Caſe a good Right to all Effects, ſave only that a poſterior *onerous* Inſeſtment, *firſt* attaining *Poſſeſſion*, was in a Competition preferable. Put the Caſe, *it had not been recorded, which ſhould have been a much greater Defect*, yet as the not recording is not a Nullity, but a Ground for the Preference of another Inſeſtment in a Competition; ſo *a Right eſtabliſhed by the next Heir to ſuch Inſeſtment*, tho' not recorded, *would be preferable to any Title, which could be made up by the ſubſequent Heir, by Service to the laſt inſeſt by a regiſtrate Seaſine*; as your Lordſhips found in a like Caſe, on a Competition amongſt Heirs, *June* 30th 1705, *Keith* of *Ludquhairn* contra *Sinclair* of *Diren.*

If a Right's being quarrellable in a Competition, were a good Reaſon for the Heirs overlooking it, *the Conſequence would be*, that *no Inſeſtment*, however regular *upon* a Precept of *Clare conſtat*, ſhould ever need to be *regarded* by the Heir; for ſuch Inſeſtments are good for nothing in Competitions, except with ſuch as acknowledge the Superior; *and yet it will not be pretended*, that there is any Speciality in the Caſe of an Inſeſtment upon a Precept of *Clare conſtat*, with Reſpect to the preſent Queſtion.

Anſ. continued. The Marquis of *Clydſdale* therefore, whoſe Author has made up no Title to the Maſter of *Cochran*'s Inſeſtments, *muſt* either *lay his Preference on a poſterior*

posterior onerous Right, as a Stranger could have done, *or he says nothing*: But, as is before observed, upon the former Part of this Point, *there is no such posterior onerous Right in this Case*. The Surrender 1680, was plainly *gratuitous*: And as to the Marriage Settlement 1684, *First*, Even that was *not* an *onerous* Right *quoad* the Lord *Cochran*. 2*dly*, No Infeftment ever followed on it. 3*dly*, The Lands in Question, upon this Point of the Declarator, are not contained under the Earl's Disposition in it, but fall under the Obligation therein, granted by the Lord *Cochran*, to make up Titles to the Lands, whereof his Father was in the Fee; *which is the rather noticed*, that of it self, it affords an Argument in this Case: For, as no Doubt, the best Lawyers in the Nation were advised on this Settlement; so had they been of the Opinion of the new Doctrine, that is now pled for the Marquis of *Clydsdale*, 'That the Resignation 1680, did habily transmit those Lands': This had been an idle Obligation; but they knew better Things.

Which leads, in the next Place, to a separate Argument, offered for the Marquis of *Clydsdale*, in Support of the Surrender 1680; 'That the same 'ought to be found a valid Title, *at least*, with Respect to the Lands 'of *Cochran*, contained in the Infeftment on the Marriage Settlement '1653,' in Regard that Infeftment was only recorded in the Register for the County of *Air*, wherein lay the Lands of *Dundonald* and others, the greatest Part of the Estate thereby disponed, but was not recorded in the Register for the County of *Renfrew*, as it ought to have been for the Lands of *Cochran* &c. which lay in that County: *And thence it was argued*, that the Infeftment being void, as to the Lands of *Cochran*, there was, in so far at least, no Occasion to make up any Title to it, but to take a new Right from the Grantor. Marq. objects that the Infeftment 1653 is void, because not recorded.

Your Lordships will have observed, That this is likewise in a great Measure obviated, For, *First*, *Neither is the not recording of an Infeftment a Nullity*; for the Act of Parliament 1617, which introduced our Records, provides only, *That Seasines, for thereafter not recorded, shall not prejudge a third Party, who acquires a posterior, perfect and lawful Right to the Lands*; but they are not therefore void; they are real Rights, and produce all Actions which arise from real Rights, (a) tho' they may be defeat in a Competition. 2*do*, *They are good against the Granter and his Heirs, which*, of it self, *is enough in this Case*; and in the Case just now mentioned, *Keith* of *Ludquhairn* contra *Sinclair* of *Diren*, it was *adjudged* by the Lords, that *the Assignee of an Heir, who had served to his Ancestor*, tho' infeft by an unregistrate Seasine, *was preferable to a subsequent Heir, making up his Title to his Ancestor last infeft by Seasine on* Record. It might be noticed in the third Place, that in some Respect this Argument is yet weaker than the former, of its being *a* Base *Infeftment not cled with Possession*; For, *there was nothing to hinder* John *Lord* Cochran, *to have registrate his Father's Infeftment by Warrant of the Lords*, by which it became as unexceptionable, as if it had been registrate within Sixty Days of its Date, excepting Earl's Ans.

(a) March 25, 1623, L. Dunipace. March 24, 1626, Gray. June 12, 1673, Fas contra the Laird of Pourie, and Lord Balmerinoch.

cepting only, as to interveening competing Rights, betwixt the Regiſtration and the Date of it (a).

A 2d Anſ. to the two former Object. for the Marq.

But, in the next Place, 'Admitting that *William* Lord *Cochran's* 'Baſe Infeftments in the 1653 and 1656, had been void as either not 'cled with Poſſeſſion, or not recorded; *Nay admitting*, that there had been 'no Infeftment at all, but that there had only been a naked 'perſonal Diſpoſition, in the Perſon of *William* Lord *Cochran*: *Yet ſtill*, unleſs a Title had been made up, *to that perſonal Diſpoſition*, by ſome of the preceeding apparent Heirs, *the preſent Earl muſt have the* only Title *to that Diſpoſition, and Lands thereby conveyed, notwithſtanding of the poſterior gratuitous Infeftment, flowing to* John *Lord* Cochran, *from his Grandfather the Superior*. Should a Man, whoſe Eſtate ſtands provided by a ſimple Deſtination to Heirs whomever, diſpone a Part of it to his Brother, and his Heirs Male, whereupon no Inſeftment is taken: The Diſponer dies, the Diſponee likewiſe dies, leaving no Heirs Male of his Body; the Diſponer's Son, who is Heir Male and of Line to both Father and Uncle, ſerves only Heir to his Father, whoſe Eſtate ſtood provided, as ſaid is, to Heirs whomever: This Son dies leaving only a Daughter; and a Competition ariſes between the Daughter and the next Heir Male, anent that Part of the Eſtate diſponed by her Grandfather to his Brother, and his Heirs Male; *No Man can doubt, but that the Heir Male* ſhould, by a Service to his Anceſtor the Diſponee, *have a Title to that Diſpoſition, in Favours of Heirs Male, preferably* to the Daughter; and the gratuitous Diſponee of her Father could be in no better Caſe than ſhe, *which comes juſt to the preſent Queſtion*.

Anſ. continued.

If the Law ſtood otherwiſe, and that even a perſonal Right could be paſſed over by the Heir; *Or, which is the Caſe in Hand*, if *John* Lord *Cochran* could by Law have paſſed over his Father's Right, and compleated a Title in himſelf, without noticing it; *Then it ſeems certain, that the acquiring a new Right from his Grandfather, was no* paſſive Title *to his Father*: So was the Genius of our Law, before the *Statute* 1695; nay, ſo is it ſtill, where the Heir *paſt by* was not three Years in Poſſeſſion; What then ſhould have become of his Father's onerous Creditors? If his Right was ſopited by the new Right taken from the Grandfather, *they were undone*: *For the Acquirer was liable in no paſſive Title, and yet the Right was carried out of the Perſon of their Debitor*. A plain Conſequence, if the Law ſtood as the Marquis pleads it; *But this ſhould be what the Juſtice of the Law would not ſuffer*. For tho' the Acquirer was not *paſſive* liable, he could be charged by his Father's Creditors to enter Heir to him, and upon his *Renuncitaion* to enter Heir, the Diſpoſition to his Father could be adjudged. *Is not that then* a Demonſtration, *that the Surrender, by his Grandfather, did not tranſmit to him his Father's Diſpoſition?* And if it did not, what is it that can hinder the preſent Earl, who is the Heir in that Right, to take it up?

It

(a) Stair Inſtit. Tit. Compet. Part 22.

It can have no Influence upon the preceeding Argument, that, as the Law then ſtood, Procuratories of Surrender died with the Receiver; whence the Lawiers for the Marquis of *Clydſdale* ſeemed to argue, That tho' the Objection, made to the Method *John* Lord *Cochran* took to make up his Title, might be good as the Law now ſtands; yet in as much as he could not at that Time, have completed a *Publick* Inſeſtment any other Way, than by obtaining a new Procuratory of Surrender from his Grandfather; that therefore the Surrender 1680, was the propereſt legal Method of eſtabliſhing his Right.

Marq. objects that the Surrender 1680 was neceſſary to make a publick Inſeſtment.

For *before the Act of Parliament, allowing* Procuratories *to be further executed after the Death of the Grantor and Receiver*, a Service *was neceſſary, in order to give Action againſt the Superior*; without which Service, the Procuratory, by the voluntary Grant of the Superior, did not tranſmit the perſonal Right which was in the Anceſtor: So that the ſuperveening Law, allowing the Procuratory directly to be execute without the Intervention of the Superior, makes no Difference, *a Service being as neceſſary before that Statute, to carry the Title of the Action, as it is at this Day to carry the Procuratory*. Had there been a *Service*, it is owned, the Earl could not have objected, that the Superior had voluntarily ſurrendred without an Action; But the Objection is, *There was no Service*, which was neceſſary to produce the Action, or to enable the Superior to ſurrender by a voluntary Deed.

The Earl's Anſwer.

'Tis out of the Caſe to ſay, 'The Lord *Cochran*'s Inſeſtment was ſo-'pited or extinguiſhed, by the ſuperveening *Publick* Inſeſtment given to his 'apparent Heir'; for tho' a ſuperveening *Publick* Inſeſtment does extinguiſh a *prior baſe* Inſeſtment, and conſolidate the Property with the Superiority; yet *that is only, where both the Inſeſtments meet in the ſame Perſon*, for *otherwiſe there are no* termini habiles *of ſuch* Conſolidation.

Publick and Baſe Inſeſtments are only conſolidate when they meet in one Perſon.

It is as little to the Caſe to plead, *that becauſe Earl* William, *before he denuded of the Superiority, might have given a Precept of* clare conſtat *for inſefting Lord* John *his Grandchild as Heir to his Father; therefore Lord* William's *Inſeſtment, upon his Surrender, muſt have the ſame Effect*. For *id agitur* by a Precept of *clare conſtat*, to transfer the Inſeſtment of the Anceſtor; it is an Inſeſtment given to the Receiver *qua Heir*; whereas the direct contrary *agebatur*, by the Surrender 1680, *viz. To give a new Right as if no ſuch Inſeſtment had ever been*, When it proceeded on a Recital, *That there was no Right in the Perſon of* William *Lord* Cochran *at all*; It can never then be Equivalent to a Precept of *clare conſtat*, when in Effect, tho' in other Words it bears, *That* clare conſtat *the Receiver was not Heir to his Anceſtor in the Eſtate*. And the Lords will further obſerve, there's no Right given to *John* Lord *Cochran* by his Grandfather, but what might have been given, even while his Father was alive, and which therefore could never be a habile Method, of making up a Title to the Rights that were in his *Father's* Perſon.

The Surrender 1680 not equal to a *Clare conſtat*.

And whereas in the next Place it was pretended; *That no Body could quarrel this Method of making up the Title*: So far may be true, ſo long as the Lord *Cochran*, or thoſe who were Heirs to him in *both* Rights, were on Life;

An Heir may plead the want of a Title in the former Heir.

Life; For so neither while an apparent Heir lives, can any quarrel his transmitting his Right, tho' he should make up no Title to it at all. *But it does not* therefore *follow, that upon his Death, who had made up no Title, or no legal Title, that the next Heir cannot quarrel the Validity of the Transmission*, and in that lies the whole of the present Question.

The *Equity* as well as *Law* is on the Earl's Side.

As the Earl of Dundonald *hopes* he has the Law on his Side, *he surely* has the Favour of the Case: *He is not here taking the Advantage* of a Mistake of his Ancestor to avoid his *onerous* or *rational* Deeds: *He's pleading* this Argument, *in Support of the ancient Investitures*, which were calculate by the Founder of the Family for the Preservation of it, *to defeat*, he begs leave to say, *a most irrational Deed*, by which they're said to have been altered; *He is pleading* that certain *imaginary suppletory* Arguments *be not sustained* to support the *Right* of the Granter, *which without Question was void in Law*: What Liberty your Lordships may sometimes have taken betwixt *Heirs* and *Creditors*, the Earl does not know, *but in all Competitions amongst Persons who are but* in pari casu, *the Rules of Law are to be observed*, not only in the Case of competing Creditors, but even in the Competition amongst Heirs †.

The Marq. objects from the Statute 1695.

It was in the last Place alledged by the Marquis, *That admitting* the Fee of these Lands not to have been established in the Person of *John* Lord *Cochran*, and consequently not in the Person of *John* Earl of *Dundonald* his Son, who granted the Bond of Entail in the Year 1716, *and which Bond is, on this part of the Argument* supposed, *to call the Dutchess of* Hamilton, *to the Succession, preferable to the present Earl;* yet in as much as they were still apparent Heirs in the Subject, and that the present Earl of *Dundonald* cannot, any other Way, make up his Title, than by *passing them by*, and serving to *William* Lord *Cochran* his Grandfather, and Remoter Predecessor; That he is by the Act of Parliament 1695, bound to fulfil their Debts and Deeds.

Earl's Ans.

Before the Earl make particular Answer to this Objection, *he begs leave in the* first Place *to observe*, That the present Question is singly, *Whether the Marquis of* Clydsdale *is entitled to the Estate, in the Right of any Deeds granted by his Predecessors*; and the Earl conceives it is a good *Plea* against those Deeds, *That they flowed* a non habente, *the Granters being only apparent Heirs*. It is entirely a separate Question, *Whether there be a Method in Law, by which he can make up his Title, to the Estate, without incurring* a passive Title *to the Grantor of these Deeds*; And the only Amount of the Argument from the Act 1695, is, *That he cannot*; to which the Earl at present needs make no other Answer, *But that he has not yet passed by the intermediate apparent Heirs, and served to his Remoter Ancestor*

It is true he is in Possession as apparent Heir of his Remoter Ancestor last infeft: But he begs leave to think, that tho' he or the suc-

† December 1681, Speed contra Speed. Sir Patrick Hume, and Collect. Decis. 45, Feb. 11. 1708, Ker contra Howison.

ſucceeding Heirs of Inveſtiture ſhould continue ſo, for the Space of an hundred Years, he can be liable to no Action laid upon the Deed of a preceeding apparent Heir, who had no other Right; And that without *Diſtinction*, whether that Deed of ſuch apparent Heir imported a *Debt* or *not*, or whether it was *onerous* or *gratuitous*. This Act of Parliament *lays no Obligation on him to ſerve* to his remoter Predeceſſor; *only in the caſe that he do ſerve, &c. it declares him liable, and then*, and no ſooner, *is he bound to make Anſwer to any Demand founded on this Statute.*

The Earl might further obſerve, That there may be *various Methods in Law*, by which he might be adviſed *even to make up a Title* to this Eſtate, *without incuring any of the* paſſive Titles, *introduced by this Statute*; What if, at the ſame Time he ſerves in Special to his remoter Anceſtor laſt infeft, *he ſhould likewiſe ſerve* cum beneficio inventarii, *to the intermediate preceeding apparent Heirs, and give up the Eſtate in the Inventary?* He believes he ſhould have a tenable Point to plead, *That his own proper Right, as Heir to his Anceſtor laſt infeft, did exhauſt the Inventary preferably to the Deed of the intermediate apparent Heir, who had no Title.* Anſwer continued.

Or, What if in the next Place, *he ſhould really contract Debt to the Value of the Lands, and that his Creditors ſhould evict the Eſtate by an Adjudication*; This is not *a poſſeſſing by an Adjudication on his own Bond*, which is the only other paſſive Title introduced by that Statute: It is not the Leading of ſuch an Adjudication, *but* ſingly the *poſſeſſing* by Vertue of it, *which* makes the paſſive Title. Now in this *ſuppoſed Caſe*, the Earl never comes to poſſeſs; for it is really an Adjudication led by his Creditor, for the Creditor's own Behoof; and there is nothing in this Statute that can entitle the Creditor of the preceeding apparent Heirs, to oblige the Earl to purge it; For tho' the Creditors of *William* Lord *Cochran*, the Perſon laſt infeft, could indeed oblige his apparent Heir to purge an Adjudication, by which the Eſtate of their Debitor were carried off, for the apparent Heir's Debt; yet that is, becauſe an Eſtate, which really belonged to their Debitor, is carried off for his Heirs Behoof; whereas ſhould the Earl take the Method here ſuppoſed, there is no Eſtate which belonged to their Debitor the Granter of the Deeds, that goes to the Earl's Uſe. What if, in the Third Place, *the Earl ſhould as apparent Heir of the Lord* Cochran, *expoſe the Eſtate to Roup and Sale*, which he can do, tho' it is not Bankrupt? He begs Leave to ſay, he does not ſee *upon what Part of this Act of Parliament he could be attacked* by the Creditor of any of the intermediate apparent Heirs, *tho' he ſhould become Purchaſer himſelf*; but yet much leſs can he ſee it, *ſhould another Purchaſer be preferred*, tho' he drew the Price. Before this Act of Parliament, it is certain he ſhould have had nothing to do with ſuch Creditor; and the Act has only made an Alteration in two Caſes therein particularly expreſt, *viz. where the apparent Heir ſerves Heir to his remoter Anceſtor*, paſſing by *the intermediate*; *Or* poſſeſſes *by an Adjudication on his own Bond*; and the Earl ſhould do neither.

But

But these Things the Earl has only mentioned, *to shew how fruitless* the Declarator, *for the* Marquis of *Clydsdale, must prove in all Events*, when 'tis evident that by one or other of these Methods, it is in the Power of the Earl of *Dundonald*, so to make up a Title to his Estate, as not to be liable, even to the *onerous* Debts or Deeds of the intermediate apparent Heir.

Answer 2. But in the second Place, and more particularly, *'tis humbly thought that this Act of Parliament*, subjecting the Heir *passing by*, to the *Debts and Deeds* of the intermediate apparent Heirs, *does not at all extend to gratuitous Bonds of Entail or Destinations of Succession, made by such intermediate apparent Heirs*; and that it does by no Means concern *Disputes, amongst the several Heirs*, but singly such as arise *betwixt Heirs and Creditors*; as is evident from the whole Contexture and Strain of the Statute, especially when compared with the Genius of our former Law. It is inscribed in the Rubrick, an Act for obviating the *Frauds of apparent Heirs*: It proceeds upon the Preamble, of the *frequent Frauds and Disappointments that Creditors suffer, upon the Decease of their Debitors, and through the Contrivance of apparent Heirs to their Prejudice*, and for Remeed thereof *Statutes*, &c. Here is the Abuse intended to be redressed, *The Frauds done to Creditors upon the Decease of their Debitors*; and therefore the Statute ought not to be further extended, than in Favours of those who were *Creditors to the deceast apparent Heirs*: For whereas the Argument for the Marquis of *Clydsdale*, is singly laid upon the Generality of the Words of the Act of Parliament, that the Heir *passing by* shall be liable for Debts *and Deeds*: Yet as this is at best an extraordinary Statute, and entirely contrary to the Genius and Analogy of all Law, *that one can by his Debts or Deeds affect a Subject to which he has no Title*; So tho' *as far as it goes*, it must be binding *as a Statute*; yet thus far, at least, ought to be admitted, *That the same is not to be extended*; and that any doubtful Expression is to be explained, agreeably to what appears to have been the *Intention of the Legislature*, and that therefore the Word *Deeds*, should only be understood *of such Deeds* as were Debts of, and *obligatory upon the Grantor*.

Answer continued. It has *justly* been made a *Question*, if under the Word *Deeds* direct *Conveyances* were at all *comprehended*; And it is believed the *late Decision* in the Case of *Muirhead* of *Drumpark*, was the *first* where it was so found: But then the Lords will well remember, that it proceeded on this *special* Ground; that being in a *Marriage Settlement*, it was an *onerous Deed*: It was a *Debt* on the Grantor, and implied *Warranty*; wherefore the Lords thought *such Deeds* fell under the *Reason of the Law*: But as naked *Destinations of Succession* have none of *those Characters*, it must be plain they were not at all *in View* when this Act was made: And which is yet further evident, from the after Part of the Act, *regulating* the Preference of Creditors as to Times past, and of the Creditors of the *Ancestor*, interjected *Heir*, and entring *Heir*; where *Debts* are only mentioned, as including what had been severally expresst before by *Debts and Deeds*.

Answer continued. There is yet this *further Observation* arises from the *Variation* of the Expression in *this Clause*, and in the *subsequent Clauses* of the Act: For where-

whereas in *this Clauſe* it is only declared, that the *Heir paſſing by ſhall be liable to the Debts and Deeds of the Perſon interjected*; yet when by the immediate *following Clauſe*, it is declared, 'That an Heir acquiring a 'Right by ſingular Titles to his Predeceſſor's Eſtate, ſhall be liable for 'his *Debts and Deeds*;' It is *there added*, That he ſhall be liable for them, *in ſuch Manner as if the ſaid apparent Heir were lawfully ſerved Heir to his Anceſtor*, which plainly was intended, to carry the Matter further than was done in the former Caſe: For, in the former Caſe, the Heir *paſſing by*, is only made liable to the *Debts and Deeds of his Anceſtor, that is*, SUCH DEEDS *as were* DEBTS *upon the Anceſtor himſelf*, and by no Means *ſuch as* might affect his Heir only; but in the after Caſe, it is further added, to avoid that Reſtriction, that he is to be liable, *as if he were ſerved*.

It is alſo material to obſerve, That the Law requires *a Poſſeſſion for three Years by the intermediate Heir*, in Order to make the Heir *paſſing by* liable for theſe *Debts and Deeds*: The Reaſon whereof can be no other than this, *That* bona fide *Contractors, by ſeeing a Man ſo long in Poſſeſſion, were induced to believe he had compleated his Title to the Eſtate*. For had the *Intention* been to *enable* him, *even while he had no Title*, to alien the Eſtate *gratuitouſly*, by a naked *Deſtination of Succeſſion*, in Prejudice of the next Heir; *What Senſe* or Reaſon had there been for requiring *a three Year's Poſſeſſion* to capacitate him for this Purpoſe? Would not the Poſſeſſion of *one Day* been as good as the Poſſeſſion of *a Year*, if it had been in the Intention of the Statute at one Blow, to overturn the whole Foundations of our former Law? Anſwer continued.

To apply this Reaſoning to our preſent Caſe; *John* Earl of *Dundonald made a gratuitous Bond of Entail, or Deſtination of Succeſſion in the Year 1716, of its Nature alterable at Pleaſure*; in ſo much, *that had it even been delivered by him*, the Donees could not have hindered him to *revock* it, nor ſo much as have obliged him to *compleat* it; as is clear from our learned Author *Hope* in his leſſer Practicks, *Tit. Entails*, who after eſtabliſhing this Doctrine upon ſolid *Principles*, mentions a *Deciſion*, wherein *it was ſo adjudged* by the Court of Seſſion, in the Caſe between *Mercer* and *Mercers*. And therefore, *ſince* the Right of the Lands was not veſted in the Perſon of *John* Earl of *Dundonald*, and that his Daughters, who on this Part of the Argument, are *ſuppoſed* to have been nominated *Heirs* to him in that Bond, were not thereby made *Creditors* to him, *they cannot be intituled to plead any Benefit by this* Act of Parliament. Anſwer continued.

Which ſtill will be the more plain, if the *Nature* of ſuch Writs are conſidered, being *no more than* Conveyances, *pro omni jure*, or for all Right and Intereſt the Donor has in the Subject, or in other Words, *for all Rights that was by him tranſmiſſible*, and ſo are no other than a *Nomination* of the Perſon, who ſhould ſucceed to him, in *what Right he had veſted in his Perſon at the Time of his Death*, and implying no Sort of *Warrantie*. Thus *ſuppoſe* a Perſon makes an Entail of a Part of his Eſtate, which he believes to be his own, in Favours of his Heirs male, leaving the reſt of his Eſtate to deſcend to his Heir *ab inteſtato*, and Anſwer continued.

the

the entailed Lands are afterwards evicted, *the Heir of Entail ſhould ſurely have no Recourſe againſt the Heir of Line on Account of ſuch Eviction*; *And* that for the very Reaſon before ſet forth, *That ſuch Entail was no other than a* Nomination *by the* Donor, *of the Perſon who ſhould ſucceed him, in* SUCH *Right as he* HAD: The Aplication is eaſy, That the Act of Parliament 1695, can never give *ſuch Heir* an Action on the *paſſive Titles*, againſt any of the Donor's *Heirs*, to ſupply a *Defect* in the Donor's *Title*; And the Reaſoning, is yet the more applicable in this *particular Caſe*, that this Bond of Entail 1716, mentions *no particular Lands* to be entailed, only he obliges himſelf to reſign *all the Lands and Heritages belonging to him*, which in no Caſe imports more in Law than *an Obligation* for *what Right or Title* he had *to the ſame*; as is more fully ſet forth by our learned Author *Craig de Feudis*, when he treats that Queſtion, what is the Import of thoſe Words in a Charter, *Terras meas, tuas, ſuas*, &c. (a). It muſt then follow, if Earl *John*, who granted the Bond 1716, had *no Right*, which was the Caſe of his Title by the Surrender 1680, as flowing *a non habente*: Or if he had *ſuch* a Right only *as died with himſelf*; which was the Caſe of his Title by his *Apparancy* to *William* Lord *Cochran*, then, *his other Heirs can never be obliged to make the Right* better, *nor to ſupply the* Defect.

Anſwer 3. But to carry this Matter yet a little further; Hitherto the *Anſwer* has been made *to the Allegation* from the *Act of Parliament* 1695, upon this Ground; *That the Bond of Entail* 1716 *was not of its Nature obligatory*, or *a* Debt *upon the Granter*, as indeed it was not. But in the next Place, *ſuppoſing* it had been a Debt *by the Nature of it*, there is a ſeparate Reaſon why it was NONE *in the preſent Caſe*: Namely, *that it was not delivered*; it was in his Power to have put it in the Fire. And it is a Rule in Law, That, *Is ſolus debitor cenſetur, a quo invito, ſuo tempore exigi poteſt*: For tho' it contains a Clauſe, *diſpenſing* with the *not Delivery*, yet *that Clauſe was undelivered*, and ſo was no Obligation upon him. Nay, tho' we ſhould *ſuppoſe*, that this Bond became an Obligation on Earl *William* his Son and Heir, after his Death, and whom the preſent Earl of *Dundonald* likewiſe paſſes by; yet *ſuch Obligation* ariſing only *ex quaſi contractu* upon Earl *William* the Heir, *falls not under the Act of Parliament*, but ſingly *ſuch* Debts or *Obligations* as ariſe from *Deeds* of the Anceſtor, which were *Obligatory* on himſelf by *his own perſonal Contract*, and to which the Contracters were induced, upon the Faith of his *three Years Poſſeſſion*.

Marquis objects from the Settlement 1684, and Statute 1695 conjoined. But then the Marquis of *Clydſdale* proceeds, to urge his Argument from the Act of Parliament 1695, in another Shape. There was, *ſays he*, an Obligation undertaken by *John* Lord *Cohran*, in his Marriage Settlement, in

(a) Craig, lib. 2. tit. 3. circa med. Ex qua elegantiſſima diſtinctione Pomponii coligendum, ut quoties adjectum hoc (*meus*) certæ rei, vel *certo* fundo, cum verbo preſentis aut præteriti temporis adjunctum fuerit, *demonſtrative* tum ſumatur remque totam *diſponentis* eſſe demonſtret; ſi vere apponatur rei *incertæ*, inducit *taxationem*, uti eatenus debeatur, *quatenus concedentis* eſt, veluti ſi quis *omnes* fundos *ſuos* diſpoſuerit; nam eos *tantum*, qui *ſui* ſunt videtur ſignificare, &c.

in the Year 1684, to eſtabliſh Titles in his Perſon to ſuch Parts of the Eſtate, as had been veſted in *William* Lord *Cochran* his Father, and to convey the ſame to the Heirs Male of the Marriage: Which, *ſays the noble Lord*, was an onerous Obligation upon *John* Lord *Cochran*, in Favours of the Heirs Male of the Marriage: And that, as *John* Earl of *Dundonald*, who granted the Bond 1716, became Heir Male of that *Marriage*, on the Deceaſe of *William* his eldeſt Brother; ſo Earl *John*, by his Bond 1716, conveyed this Obligation in Favours of his Daughter: And therefore *ex conceſſis*, the preſent Earl of *Dundonald*, PASSING BY *John* Lord *Cochran* his Uncle, and ſerving to *William* Lord *Cochran* his Grandfather, muſt be liable by the Act 1695, to fulfil that *onerous* Obligation, to the Aſſignee of the Heir of the Marriage.

'Tis anſwered for the Earl of *Dundonald*, *That in as much, as the Obligation in that Marriage Settlement was conceived, firſt in Favours of the Heirs* male *of* John *Lord* Cochran's *Body; whom failing* nominatim *to* William Cochran *of* Kilmaronnock, *and the Heirs* male *of his Body, the preſent Earl is* himſelf *at this Day the* Creditor *in* that Obligation; *and ſo there can be no* termini habiles *for the Statute's ſtriking againſt him.* It is indeed true that Earl *John*, who granted the Bond 1716, might have made a Title to that *Obligation* by a Service, *as Heir of Proviſion* to *John* Lord *Cochran* his Father, and in that Caſe, if we ſuppoſe the Entail in the Settlement 1684 alterable, he might have conveyed that Obligation to his Daughters; *but he has not* ſerved, *and* otherways *he could not convey it.* For the Lords will pleaſe know, That as no Inveſtiture ever followed on the Settlement 1684; ſo upon the Death of *John* Lord *Cochran*, *William* his eldeſt Son ſerved to him, as *hæres maſculus & linealis* of the Inveſtiture 1680; And upon his Death again, *John* Earl of *Dundonald* Grantor of the Bond 1716, ſerved likewiſe to his Brother *hæres maſculus & linealis*; now there ſeems nothing more plain, than *that this Service could not carry the Obligation* or Proviſion *in the Marriage Settlement* 1684; becauſe there ariſes no *legal Evidence* from that *Service*, that either Earl *William* or Earl *John* were *ſo much as Children of that Marriage.* Let the Caſe be ſuppoſed, That *John* Lord *Cochran* had been married, before he married Lady *Suſan Hamilton*, without doubt his Son of that firſt Marriage would have been his *hæres maſculus & linealis.* The Earl of *Dundonald* then deſires to know, what *legal Evidence* there is, from the Succeſſive Services of Earls *William* and *John*, Sons to *John* Lord *Cochran*, as *hæredes maſculi & lineales* to him, that they were not Sons of a former Marriage? The Earl ſays, *legal Evidence*, becauſe it imports nothing *in this Queſtion*, That all the World knows they were Sons of this Marriage, for the ſingle Queſtion, *and not another*, is, *whether this Service is an Evidence of it?* And, *if it is not*, then, in as much as the ſame cannot be ſupplied, by any other Evidence, than what ariſes from the Face of the Service it ſelf, *It is a Demonſtration that the Service as* hæres maſculus & linealis *could not carry the* Obligation *in that Marriage Settlement*: And, *if it did not*, Earl *John* could not *convey it*; but the Title to it devolves on the *other Heirs male, and of Proviſion*, who are *ſubſtitute in*

Earl's Anſ.

the Settlement; and ſo the preſent Earl as *the next Heir ſubſtitute* is at this Day become the *Creditor in that Obligation.*

Anſwer 2. But then in the ſecond Place, The Lords are entreated to conſider, what ſhould have been the Conſequence, had Earl *John* ſerved *Heir of Proviſion* to *John* Lord *Cochran* his Father, and thereby made a Title to the ſaid Obligation. Can any Thing be plainer, than *that it became extinguiſhed by* Confuſion, *and thereby incapable of Conveyance.* That the Earl may not be miſunderſtood, *he does admit*, that a Service, as *Heir of Proviſion* or *of a Marriage*, does not *extinguiſh* the Obligation granted in Favours of *ſuch Heir*: For as an Heir of Proviſion is *an Heir*, ſo he is likewiſe *a Creditor*, and both Characters may at once ſubſiſt in him. But *the Queſtion is*, Whether if the Heir, who is *Heir of Proviſion*, ſhall ſerve *Heir of Line* to the Granter of that Proviſion, which is *ſucceſſio in univerſum jus*, if thereafter his Right to the Proviſion *qua Creditor* can ſubſiſt, or *if it is not rather thereby extinguiſhed* confuſione, *by his becoming both* Debitor *and* Creditor *in the ſame Obligation?* And that is *the preſent Caſe*, Earl *William* eldeſt Son of *John* Lord *Cochran* ſerved *Heir of Line* to him; Earl *John* his Brother ſerved again *Heir of Line* to him; is not thereby then, an End put to the *Credit* by the *Obligation* in the Settlement 1684, which therefore was no more capable of an *expreſs Tranſmiſſion*, and conſequently cannot fall under the *implied one* in the Bond of Entail 1716. Let this Matter then be taken in either Shape; *The Earl of* Dundonald *can be in no Hazard from this Obligation*; for as there was no Title made up by Earl *John* to it, *he is himſelf* now *the only* Creditor *in it*; and if there had been a Title made to it, Earl *John*'s *Service as Heir* of Line *extinguiſhed it.*

Anſ. continued. If indeed a Perſon infeft in Lands, which, *exempli gratia*, are by the Inveſtitures conceived in Favours of *Heirs whomever*, ſhall in his Marriage Settlement oblige himſelf, to reſign in Favours *of Heirs Male*: And that the eldeſt Son of that Marriage, thereafter ſerve himſelf Heir of Line and of the Inveſtiture; he may perhaps thereby, be enabled to convey the Lands; ſo as, upon the after ſpliting of the Succeſſion, it ſhould not be in the Power of the *Heir Male*, to take up the Obligation in the Marriage Settlement, in Prejudice of the gratuitous Aſſignee of the Son ſo ſerved: But then the Lords will obſerve, that the *very Reaſon* thereof is *the ſame* with the Earl of *Dundonald*'s *preſent* Argument; *namely*, That how ſoon the Son ſerves Heir *of Line* and *of the Inveſtiture*, he has no Occaſion to ſerve *Heir of Proviſion* to carry the *Obligation* in the Marriage Settlement; for by his Service, as *Heir general*, he becomes *Debitor and Creditor* in the *Obligation*, which therefore could no longer ſtand as *a ſeparate Right* in Favours of the *other Heirs Male*: And for that Reaſon *his Conveyance* of the Lands ſtands *good*. Whereas here, *while at the ſame*, *the Service* as Heir of Line *to the Lord* Cochran, extinguiſhes *the* Obligation *or* Proviſion, *in Favours of* the ſame Heir; *ſuch Service nevertheleſs does* not carry the Lands: *Becauſe the Lord* Cochran *had no other Right to the Lands, than what ſtood* a non habente; *and there lies the Difference.*

Thus

Thus far the Earl of *Dundonald* has proceeded to ſatisfy the Lords, *that no Argument can ariſe, in Favours of the Marquis of* Clydſdale, *either upon the Obligation in the Marriage Settlement* 1684, *or in vertue of the Bond of Entail* 1716. And the ſame Reaſoning applies, with Reſpect *to the Procuratory granted by the Lord* Cochran *in the* 1688, *in Favours of the Heirs Female of his own Body*. But as there are certain other ſpecial Reaſons, why the ſaid *Procuratory* 1688, can be of no Diſſervice to him, he ſhould now have taken Occaſion to mention them, were it not, that he judges, they will more naturally fall in, on the laſt Point of his Declarator, *viz. What ſhall be the Effect of ſuch of thoſe Deeds, as ſhall be found to carry in them, an Intention to alter the former Settlements.*

The further Anſwer to any Objection brought from the Settle- 1688 is deferred to the laſt Defence.

The Earl ſhall therefore proceed to the NEXT POINT of his Defence; and hopes to ſatisfy the Lords, *that as*, they now plainly ſee, *Earl* John *had no* Power in him, *to alter the former Deſtination of Succeſſion*; So, *in his Bond of Entail* 1716, *it was none of his* Intention, *to exceed the* Powers *he had by Law*; but only *to call his Daughters in their Order, upon the* Failure of *Heirs Male of the* INVESTITURE. An Argument, for which the Earl would gladly think he had no Occaſion, after what has been ſaid, *were it not*, that beſides the old Eſtate, flowing from *William* firſt Earl of *Dundonald*, *there were conſiderable Purchaſes made by the ſucceeding Earls*, William *the Second, and* John *the Granter of the Bond* 1716, which Part of the Eſtate, muſt *depend* upon the *Fate* of this Point, and of the ſubſequent and laſt Point of the *Defence*.

Earl's 4. Def. That no Alteration was intended by the Bond 1716.

To give the more diſtinct View of the *Intention* of granting *this Bond*, it has been obſerved, *that the whole Inveſtitures* of *this Eſtate*, whether ſuch as were *regularly* or *erroneouſly made*, (for upon this Point that makes no Difference) *ſtood conceived in Favours of Heirs Male*: And whereas in the Year 1688, *John* Lord *Cochran* had granted a Procuratory of Surrender, whereby he ſeems to have intended ſo far to alter the former Inveſtiture, as to ſettle the Succeſſion, *failing his Sons, and the Heirs Male of their Bodies*, upon the Heirs whomever of his own Body; When his Son Earl *John* the Third, came to marry Lady *Anne Murray* in the 1706, he appears to have been ſenſible, how hurtful this Deed of his Father's would have been to his Family; and therefore, in his Marriage Settlement, provides the Eſtate to himſelf, *and the Heirs Male to be procreate between him and the ſaid Lady* Anne Murray; *whom failing, to the Heirs Male to be procreate of his Body in any ſubſequent Marriage*; *whom failing, to his* Heirs-male whomever; *whom failing, to his* Heirs *and Aſſignees* whomever: But in this Contract *there were* Two *Eſcapes*. The Lords will have obſerved from the Tenor of the Patent, as before ſet forth, the *Deſcent* in it was to *the Heirs Male of the firſt Earl's Body*; *whom failing, to the eldeſt Heir Female of his Body without Diviſion, and who thereby was in all Time coming, to aſſume the Name and Arms*; and that, in this preciſe Form, were the Inveſtitures conceived: But by this Contract 1706, as it would ſeem by an Overſight in the Friends, the Heirs *Male whoever*, would have ſucceeded to *the Eſtate*, before this Earl *John*'s own Daughters, who yet would have ſucceeded to the *Honours* before any *Heir Male*, who was not of Earl *William*

The Bond bears to be intended for a quite different End.

liam the First's own *Body*. In the next Place, *it was not provided*, that upon the Succeſſion's devolving upon Heirs *Female*, the eldeſt ſhould have the *Eſtate without Diviſion*. For rectifying *both* thoſe *Miſtakes*, he executes this *Bond of Entail in the* 1716, as will be plain from the whole Strain and Conception of the Writ: It proceeds on this Recital, *That he was fully determined*, FAILING HEIRS MALE OF HIS OWN BODY, OR HEIRS MALE OF ANY OF THE DESCENDANTS OF HIS BODY, (and ſuch for certain were all the Heirs Male of the Inveſtiture, *tho' not deſcended of the* Bodies of the Heirs Male of his Body) *to ſettle the Succeſſion of his Eſtate in one Perſon, that the ſame might not be divided by the Succeſſion of Heirs Portioners*; and therefore he obliges himſelf and his Heirs, *&c.* and Succeſſors whomever, *failing Heirs Male, as ſaid is*, to ſurrender his Eſtate in Favours of Lady *Anne Cochran* his Daughter, *&c.* A *Preamble*, which can in no tolerable Senſe apply to *any other* Intention, *than that* of ſupplying the *Neglect* in his Marriage Settlement, to provide the Succeſſion *to the eldeſt Heir Female, on Failure of Heirs Male*; For ſo the expreſs Words of it bear, *that he had made this Deed* to prevent the Succeſſion's *dividing in that Event*. When *John* Lord *Cochran* granted his Procuratory in the Year 1688, it proceeds on a Recital, that he *intended to alter the former Settlements*: This Procuratory the Granter of the Bond had before him; and had he *intended the ſame* Thing, he had no Doubt done it on *the ſame* Recital; whereas here, there is not the leaſt Intimation of any ſuch Deſign, but the *whole Intention* diſtinctly expreſſed, *to prevent the Eſtate's dividing by the Succeſſion of Heirs Parveners*: An Event which for certain could not have happened, *till all the Heirs* Male *of the* Inveſtiture had failed, which therefore could never be meant any ſooner to take Effect.

And the Executive Clauſe in it is inconſiſtent with an Intent to alter.

If again, *the executive Clauſe* in the Bond is conſidered, *it ſeems to put this Matter beyond all Manner of Doubt; for if the Bond ſhall be taken in any* other Senſe, *than is now explained, the* executive Clauſe *ſhall be* downright Nonſenſe, *and impracticable*. 'He appoints his *Daughters*, and the Heirs 'Male of their Bodies, in the Order thereinmentioned, to be *Heirs* 'of *Taillie and Proviſion* to him, and to the Heirs Male of his Body, or 'Heirs Male of any of the Deſcendants of Body' *in his whole* Lands and Lordſhips contained in his Rights and Infeftments, 'With Power to 'them in their Order, to take *out Brieves, and obtain themſelves ſerved and* 'retoured *Heirs of Taillie therein, and obtain themſelves entered and infeft* 'in the *ſaid Lands*. Now it is ſubmitted to your Lordſhips, if it was in Nature practicable for the Ladies to take out Brieves, and *obtain themſelves ſerved and infeft in the Lands*, in any other Event on Earth, than upon *Failure of the Heirs-male in the Inveſtiture*. In that Caſe indeed, *they might have done it*, becauſe, in the very Order they are called in the Bond, they became *Heirs of the Inveſtiture*; but in any other Caſe, *it was ſimply impoſſible*.

Marq. Interpret. and Object. from the Subſtitut. of Heirs Male.

Having thus far opened the *Intention and Meaning* of this Bond, there will be little Difficulty in anſwering the Arguments, which are brought for the Marquis of *Cluſdale*, to give it another Interpretation, and which

are

are already, in a great Measure, obviated. It was alledged for the Noble Lord, That by the Condition of the Bond, *failing Heirs-male of his own Body, or Heirs-male of any of the Descendants of his Body*, the same Thing was meant, as if it had been said, *failing Heirs-male of our* OWN BODY, *or Heirs-male of the* BODY *of any of the Descendants of our Body*. And in Support of this Interpretation, it was observed, That as the Earl of *Dundonald* interprets the Bond, there were *absurd Consequences*, which, by all Means, are to be avoided, in the interpreting of Deeds; such as, *First*, That the Marquis of *Clidsdale*, being an Heir-male of one of the *Descendants* of the Granter's Body, would be comprehended in the *Condition*, before his own Mother; tho, by the after Part of the Deed, *the Heirs-male of her Body* were only substituted to herself. *2dly*, That Heirs-male whoever are *substituted* to the Ladies; which behoved to explain *the Heirs-male* of any of the *Descendants* of his Body, in the CONDITION, to mean only Heirs-male of *their Bodies*.

But the Answer is already made, That by *Heirs-male of the Descendants* of his Body, in the CONDITION, are not meant *Heirs-male whoever*, who are thereafter substitute, but only Heirs-male of the *Investiture*, that is, *Heirs-Male of the Body of the first Earl*: And by that Means, the Marquis is neither *in the Condition* nor *Substitution* of Heirs Male. Earl's Answ.

And whereas *it was pretended* for the Lord Marquis, That this was an unwarrantable *Interpolation* of the Word *Investiture*, in the *Condition* of the Bond. *The Answer is plain*, That *it was no* Interpolation at all, but a necessary *Interpretation* which arose *from the obvious Meaning of the Deed*: For, *suppose the Case*, That the *Condition* of the Bond had in expreis Terms bore, *failing Heirs-male whomever*, it should have had no other Meaning in Law, than *failing Heirs-male whomever of the* INVESTITURE: For, since *positus in conditione non censetur institutus*, good Sense would not allow one to think, the Earl meant to put *any Heir* in the *Condition*, but *such an Heir as could have succeeded*. Earl's Interpretation is not an Interpolation.

Nor was there any Thing in the Observation made for the Lord Marquis; *That* by this Bond the Granter had not only bound himself, but his *Heir-male* in the *Obligation* to resign; whence it was concluded, that the Deed supposed some *Heir-male* to be *existing*, when the Obligation was to take Effect: Whereas it was said, that according to the Earl's *Interpretation*, they should at that Time be all dead and gone. For, did not the Granter by his Obligation, such as it was, bind his own Son, *who* was *his Heir male*, was *in the Condition, and yet* was *to be dead before the Obligation took Effect*: So that if that Argument proved any Thing, it would prove too much; *tho' indeed no more*, than the Earl of *Dundonald* hopes shall be found, *that it is a Bond good for nothing*. It affords no Object. that Heirs Male are obliged.

The Lord Marquis's Procurators, finding themselves beat out of all these Objections, were forced to dispute the Import of the *Clause* itself, in the Condition of the Bond, *Heir-male of any of the Descendants*; as if the Signification thereof was the same with Heirs-male *of the Body* of any of the Descendants. *And alledged*, that Heir *of a Man*, was the same with Heir *of his Body*, and a different Thing from *Heir to him*; And Heirs of a Man, and Heirs to a Man are the same.

for

for this an Appeal was made, to the usual Conception of *Latin* Charters in the Chancery, which, when they bore *hæredibus masculis ex corpore*, &c. or *ex quovis descendentium*, it signified the same, as if they had bore *hæredibus masculis aut ex corpore descendentium*; at least, that the *Alternative* in the *Condition* had been only added from a Doubt, the Writer of the Bond might have had, whether under *Heirs-male of the Earl's own Body*, Heirs-male of his *Son's Body* were likewise comprehended. But when the Argument comes to this, there can be no Strait in the Case; *There is no arguing from the* Idiom *of a different Language, to explain an Expression in our* Mother *Tongue*: Whether one be called *a Man's Heir*, or an Heir *of him*, or an Heir *to him*, is all one and the *same Thing* in our *Language*; what if one, who had no near Relations, should by a Destination appoint the *Heirs-male of Titius* to succeed to him, 'tis believed the *learned Gentlemen*, who made the Observation for the Lord Marquis, *would not be of Opinion*, that the Heirs-male of *Titius*'s *Body*, were *only* called to the Succession.

Earl John knew the Import of the Words Heirs Male, &c.

That even the Granter of this Bond *understood*, that Heirs-male of *his own Body* comprehended likewise Heirs-male *of the Body of his Son*, is apparent from an after Clause in the Bond; where he substitutes to the Daughters, the several *Heirs-male of their Bodies*, and where for certain he did not mean *to limit the Substitution* to the Heirs-male *only*, who should be procreated *immediately of their Body*, but *understood* the same to comprehend *all the male Descendants* of their Bodies.

The Alteration of the Bonds of Provision is no Argument for the Marq.

And whereas it was further noticed for the Marquis, that while the Destination stood, which Earl *John* the Granter of this Bond made in his Marriage Settlement 1706, he had, in the 1711, given *Bonds of Provision to his Daughters, for no less than L.* 23000 Ster. *to take Effect, in case the Heirs-male* not of his Body *succeeded*; but that about the same Time that he granted this Bond of Entail, 1716, *he had recalled those Bonds of Provision, and restricted the Ladies to the Sum of* L. 8000. Whence it was argued, that he understood, by the said Bond of Entail, that no other than the Heirs-male of his Body were to succeed preferably to the Daughters: *The Observation has plainly nothing more in it, than that the Circumstances of the Family were much changed to the worse in* 1716 *from what they had been in the* 1711: Great Debts had been in that Period contracted, which was the *only Cause* of restricting his Daughters Provisions; and as about the Time he restricted the Provisions, *he likewise executed a Deed* to enable his Friends, after his Death, *to sell Lands* for Payment of his Debts; *so in virtue of that* Deed, there has been *an Estate of* 1500 L. per Annum *sold since his Decease*, and yet a great Part of the Debt remains unpaid.

Argument on this Point sum'd up.

To sum up the *Argument* upon *this Point*; as the *Deed itself* in the *proper Import* and Signification of the *Words* can only be understood according to the *Interpretation* the Earl of *Dundonald* puts upon it, and as that *Interpretation* is likewise agreeable to the *Intention* of the *Granter*, as he has *himself expresst* in the *Recital* of the Deed: So it is not only *agreeable* to the *executive* Part of the Deed, but *that Part* of

it

it is *Nonſenſe and impracticable*, if it ſhall be taken in any other Meaning.

But now to all this the Earl begs Leave to add *this further Obſervation*, with which he ſhall conclude this Point, That tho' he had not near ſo much to ſay, and that the Words in Queſtion did but bear a *doubtful Meaning*, they ſhould, by all the known Rules of Interpretation, fall to be interprete in his Favours: *Verba non præſumuntur otioſa.* Why then was this *Alternative* in the Condition, *or Heirs Male of any of the Deſcendants of his Body*, if it meant no other Thing than what was *comprehended* under the *firſt* Alternative, *Heirs of his own Body*? 2*dly*, It is a *Rule* properly applicable to the Caſe in hand, *That no Man is preſumed to alter former Inveſtitures.* The Preſumption always ſtands for what ſhould obtain *ab inteſtato*, eſpecially for *antient Inveſtitures.* 3*dly*, It is a *governing Rule*, in explaining any Thing that may be doubtful in all Deeds of whatever Kind, That Men are preſumed to *act rationally*; and here the Sum of the Argument, as before pled upon the firſt Point of the Declarator, for ſhowing the *Intention* of the firſt Earl of *Dundonald*, *That the Deſtination ſhould not be alterable*, does with equal Force apply to explain, That *it was not the Intention of this Deed, that it ſhould be altered.* In the *Laſt* Place, Wherever a Deed will admit *two Meanings*, the one *good Senſe, and practicable* in *all its* Parts, the other *Nonſenſe, and impracticable* in *any of its* Parts, there can be little Doubt where the Ballance is to ly. And by all, and each of theſe Rules, were there but a Dubiety in the Caſe, as the Earl hopes from what he has before ſaid there is none, the *Interpretation* ought to be put upon the *Deed*, as he pleads it; *and conſequently, that he, as* Heir Male *of the* Inveſtiture, *being in the* Condition *of the* Bond, *the Declarator, at the Inſtance of the Marquis of* Clydſdale, ought *to be ſet aſide.*

Arg. 2d for explaining the Bond 1716 according to the Earl's Interpretation.

The Earl comes now to the LAST POINT of his Defence, *That in no Event, can the Bond of Entail* 1716, *nor the Procuratory* 1688, *or* 1722, which are the other Deeds on which the Marquis of *Clydſdale*'s Declarator is founded, *be of any Effect to the Earl's Prejudice*: And on this Point it muſt be, for Argument's Sake, *ſuppoſed*, That notwithſtanding *of what has been ſaid, upon the firſt two Points of the Declarator*, the ſeveral preceeding Earls had *Power* in them to have *altered* the Settlement; and that notwithſtanding *of what has been ſaid upon the other Point of the Declarator*, it was their *Intention* by theſe Deeds to exerce *ſuch Power.*

Earl's 5. Def. That the Deeds in 1688, 1716, & 1722, can in no Event prejudge the Earl.

And *Firſt*, As to the Procuratory of *Surrender* 1688, *whereby* John *Lord* Cochran obliges himſelf to reſign in Favours of himſelf in *Liferent*, and *William* Lord *Cochran*, (afterwards Earl *William* II.) *his eldeſt Son, in Fie, and the Heirs Male of his Body; whom failing, to his other Heirs Male* therein mentioned; *whom* failing, in Favours of the eldeſt Heir Female of his Body, *&c.* there was nothing in that Grant *diſabling William* Lord *Cochran* the Fiar from making up *ſeparate Titles* to the Eſtate. It was in his Option either to enter thereto by virtue of the ſaid *Procuratory*, or by *Service*, on the Footing of the *old Inveſtiture*: It was an Entail to *himſelf*, which he was at Liberty to *repudiate*, and which accordingly *he did.* For, as the Lords will have before obſerved, Earl *William* II. eldeſt Son of the ſaid

1mo. The Procuratory 1688 was ſopite by Services to the Inveſt. 1680.

John

John Lord *Cochran*, and after him *John* Earl of *Dundonald* his Brother ſerved *Heirs Male, and of Line*, upon the *former* Inveſtiture, *to their Father*, in the 1680, *whereby this Procuratory* became *extinguiſhed*.

And the Marq. cannot revive that Procuratory.

It was taken Notice of for the Lord Marquis, That the very ſame Argument pled for the Earl of *Dundonald*, *viz.*, *That no Title having been made to the Inveſtment, which ſtood in the Perſon of* William *firſt Lord* Cochran, *the Earl had at this Day Acceſs to ſerve to it*, applies in the ſame Manner for the Marquis; That no Title, having been made to the ſaid Procuratory 1688, 'tis open to his Lordſhip, as Heir of the eldeſt Heir Female of the Granter's Body to carry it by a Service: *But the Difference between the Two Caſes is obvious.* The Earl of *Dundonald*'s Argument is, That ſeeing *William* firſt Lord *Cochran*'s Right was never eſtabliſhed in the Perſon of the ſucceeding Earls, he is the apparent Heir, and can yet ſerve to him. In that Caſe there were two *ſeveral* Rights in *different* Perſons, a Right of *Superiority* in the Perſon of *William* I. Earl of *Dundonald*; and a Right of *Property* in the *Perſon* of *William* Lord *Cochran*, which never having been carried into the *Perſon* of *John* Lord *Cochran* his Son, the *ſubſequent Inveſtment*, flowing from the Grandfather, could not extinguiſh it: *But the Argument fails*, when pled for the Marquis of *Clydſdale*; becauſe both the Rights are in the ſame Perſon. Earl *William* II. to whom the Procuratory 1688, was granted in *Fee*, was likewiſe *Heir of the Inveſtiture*, ſuch as it was in the Granter his Father's Perſon: *And therefore*, how ſoon he made up a *Title* to the Lands, *by one* of thoſe Rights, it put an End to, and *abſorbed the other*.

In ſimple Deſtinations the Subſtitutes muſt follow the Inſtitutes Choice, and Procuratory 1688, voided by Settlement 1706.

It may on ſome Occaſions have been made a Queſtion, Whether the *firſt Inſtitute* in an Entail, who was likewiſe *Heir* in the *former Inveſtiture*, could repudiate that *Entail* in Prejudice of the *Subſtitutes?* But 'tis humbly thought, that *can only be a Queſtion* when it is an *Entail* under *Limitations*, by prohibitory and irritant Clauſes, and not in the *Power* of the *Inſtitute* to prejudge the *Subſtitute*: But where it is only a *ſimple Deſtination* of Succeſſion, as was this *Procuratory* 1688, whereby the Subſtitutes had no *jus quæſitum* other than a *nuda ſpes ſuccedendi*, and who could not otherwiſe come to the Eſtate, than as *ſimple* Heirs to the *Subſtitute*, the *Subſtitutes* muſt follow *his Choice* of the *Title* by which he has thought fit *to ſucceed*. But then in the next Place, this Procuratory was *not only neglected*, and thereby *voided*, as ſaid is, but *actually altered* by Earl *John* II. in his Marriage Settlement in the Year 1706, which, ſo far as it went, *replaced* the Heir of the *antient Inveſtiture*.

2do. The Deeds 1688, 1716, and 1722 void becauſe not recorded. The Reaſons for the Statute 1685.

2*do*, *Neither* this Procuratory 1688, Bond of Intail 1716, *nor* Procuratory 1722, *can be of any Effect*, *none of them having been recorded in the Regiſter of Entails, as the Act of Parliament 1685 directs*; which Obſervation, ariſing from the Explanation of a Statute, the Earl ſhall, without much Argument, ſubmit it to the Lords.

This Act of Parliament is now the governing Rule on the Subject of Entails. It has put all that Matter intirely on a new Bottom: Before this Time, every Proprietor had it in his own Power, by *his own ſimple Deed*, to entail his Eſtate upon *what Perſons* he pleaſed, and under *what Limitations* he thought fit: But now, by this Statute, tho' the ſame Power is left to every

every Man to *choose his Heirs*, yet there is something more to be done, before the Deed wherein that Choice is made, can become effectual. It must be *recorded in a proper Register appointed for that Purpose*; otherwise, by the expreſs Words of the Act of Parliament, it is not to be allowed: A Regulation, which ſeems to have had its Riſe from *moſt rational* Conſiderations, that as, in the Caſe of Entails under proper *Limitations*, *againſt contracting of Debt*, Creditors might be certiorate of the Circumſtances of *the Perſon* with whom they contract; ſo, in the Caſe of the *moſt ſimple Deſtinations*, ſuch Deeds might carry a ſolemn publick Teſtimony, *that they were the Act of a deliberate Mind*, and that *all Family Broils might be prevented*; which frequently enſue upon the Uncertainty of a Succeſſion.

It was obſerved for the Marquis, That this Act of Parliament ſingly concerned *Creditors*, and ſtatuted, that Clauſes *irritant and reſolutive* in Entails, ſhould *not ſubſiſt* to their Prejudice, unleſs the Entail had been *recorded*; but that it did not at all concern the *Heirs of Entail*, even where the Entail was made in Favours of the Heir *ab inteſtato* with Irritancies, who was tied by the Quality in the Right, *whether recorded or not*; as your Lordſhips were ſaid to have found in the late Caſe of the Entail of *Dorator*: And *much leſs* did it concern *ſimple Deſtinations* of Succeſſion, made in Prejudice of the Heir *ab inteſtato*. Marq. Object. that Statute ſingly concerns Creditors.

It is anſwered, That this Diſtinction betwixt Heirs and Creditors is without all Foundation in the Act of Parliament, whereby it plainly appears, That the whole Syſtem of the former Law of Entails is ſo far altered, and of new modelled, that whereas, tho' before this Act of Parliament, it was as much in the Power of the *Proprietor*, by his own *ſimple Deed*, to entail his Eſtate with *effectual Limitations* againſt Creditors, as it was to choice the *Perſons* he intended for his *Succeſſors*. Now, after this Statute, it is not in his Power to do either, otherwiſe, than *by a publick Deed*. So far the Statute is *Declaratory*, that it gives the Proprietar *no more* Power than he had: Neither, properly ſpeaking, does it *limit* his Power further, than as it requires an *additional Solemnity of Publication*, to give it *Effect*. Had it been in the Power of a Proprietar before that Time, to limit his *Succeſſor*, but not to impoſe Limitations that could affect *Creditors*, there might be ſome Reaſon in the Diſtinction; but where the *One* was in the Proprietar's Power, as much as the *Other*, and that the Act allows every Man to entail his Eſtate as he *pleaſes*, and then adds, that no ſuch Entail ſhall be allowed, *unleſs recorded*, how can there be *Place* for the *Diſtinction*? Earl's Anſwer.

It is, with Submiſſion, *a Miſtake*, That ever the Lords *adjudged* the Qualities of an Entail, in Favours of an Heir *ab inteſtato*, binding upon him, tho not recorded: For, *in the Caſe of* Dorator, the Reaſon of the Deciſion was, *That the Heir* ab inteſtato, *in whoſe Favours the Entail was made, had accepted it, and made it the Title of his Poſſeſſion*: And therefore the Lords found, *That ſince he had accepted of the Right, he muſt take it with its Qualities*: But the Queſtion here is, whether, had he not accepted it, the Lords would have found, *he muſt have done it*? And no Caſe ſince this Act of Parliament can be ſhown, wherein the Lords *ſo found*. And *it ſeems to be a Conſequence* Heirs ab inteſtato not bound by unrecorded Entails unleſs they accept.

sequence, That if an Entail in Favours of the Heir *ab inteſtato* with Irritancies, *in caſe of not Acceptance, will not bind him to accept*; Neither can the Heir *ab inteſtato*, in whoſe *Prejudice* an Entail is made, *be bound to acknowledge it.*

The Deeds 1688, 1716, 1722 revoked by E. William III.

The Earl comes now *to the third and laſt Reaſon*, why thoſe Deeds can in no Event be of any Effect; That *all and each of them are, by ſubſequent and moſt rational Deeds, altered by* William *Earl of* Dundonald *laſt deceaſed, in the Year* 1725. For underſtanding whereof, the Lords will pleaſe know, That in the Year 1722, Earl *William* the Third *intirely miſapprehending* Earl *John* his Father's *Intention* by his Bond of Entail 1716, did, with Conſent of his Curators, grant a Procuratory of Surrender, for Reſigning his Eſtate in Favours of *himſelf, and the Heirs to be procreate of his Body in Fie; whom failing, in Favours of Lady* Ann *his Siſter*, &c. and bearing to be *for Performance* of the Bond 1716. The Lords will have obſerved from the *Explanation* that has juſt now been *made of the Deed* 1716, what a *Miſtake* it was to imagine, that this Procuratory was *in Implement* of it. The Lords will further obſerve, from ſo much of this Procuratory as is here recited, That *it was not in Implement* of the Bond 1716, *even in the Senſe* the Lord Marquis himſelf *would have it underſtood*, in ſo far as, not only the *Heirs-male* of Earl *William*'s own Body, but the *Heirs whoever* of his Body *were called to ſucceed* before his *Siſters*: Whence it will be apparent, that this Procuratory proceeded *intirely* from a *miſtaken* Notion of what had been his Father's *Intention* by the Bond 1716. When Earl *William*, after more mature Deliberation, came to reflect on thoſe Things, and further, was ſenſible, that, tho' even his Father's Intention *had been* to call his Daughters to the Succeſſion, upon the Failure of Heirs-male of *his own Body*, yet it was a ruining Thing to his Family, to ſeparate his Honours and Eſtate; He, with Conſent of a *Quorum* of his Curators, in the Year 1725, upon that Narrative, and on the *Recital* of *other* very rational *Conſiderations*, which are ingroſſed in the Deed itſelf hereto annexed and referred to, *revokes* all Procuratories, Bonds and Conveyances, made in Favours of the *Heir of Line*, and in Prejudice of the *Heir of Inveſtiture*; and *provides* that *failing Heirs-male of his own Body*, his Eſtate ſhould devolve on *his Heirs-male, and other Heirs* ſucceeding to him *in his Titles and Dignities*: And of the ſame Date he grants a Bond of Entail, in Favours of *himſelf and the Heirs male of his own Body*; *whom failing, in Favours of* Thomas Cochran *of* Kilmarnonnock, *the* preſent Earl, who was *his neareſt Heir-male, and the other Heirs ſucceeding in the Dignity of Earl of* Dundonald; RESERVING *to himſelf a Power to alter*: which Bond proceeds on this further valuable *Conſideration*, That the ſaid *Thomas* had ſettled his Eſtate, *failing Heirs male of his Body*, in Favours of the ſaid Earl *William, and his Heirs ſucceeding to him in his Honours and Titles*: Which Bond of Entail was accordingly, of that Date, granted by the ſaid *Thomas, without reſerving to himſelf any Power to alter.*

Deed 1722, was not a Performance of Bond 1716, but granted by Miſtake.

And revoked for this and other rational and valuable Conſiderations, by the Deeds 1725.

In this Situation the Earl of *Dundonald* humbly conceives, *theſe laſt Deeds ought to be declared in all Events valid and effectual in his Favours.*

Marq. diſputes not the Powers of the Granter.

The Marquis of *Clydſdale did not* pretend to to *diſpute* Earl *William*'s *Powers* of granting theſe Deeds, nor was there any Reaſon why he ſhould.

He

He was *fully veſted* in the Right of the Eſtate; and even according to the *Interpretation* put upon the *Bond* 1716, by the Lord Marquis himſelf, Lady *Ann* was only called as *Heir to him*. But *becauſe of certain Circumſtances*, the Marquis alledged *thoſe Deeds to be void*. *1ſt*, As granted in his Minority with a ſcrimp *Quorum* of his Curators, who were ſaid to be pretty nearly *intereſted* in the *Alteration*, he is alledged (and on this Part of the Argument is ſuppoſed) to have then made, as being *next in the Succeſſion* to the preſent Earl: And *2dly*, That they were granted on Death-bed. Objections, which appear very bulky, *when looked to at a Diſtance*, but which, when brought nearer the Eye, and ſeen in their true Light, *dwindle into nothing*. of the Deeds 1725, but objects *Minority* and *Death-bed*.

And *1ſt*, as to the Objection of Minority. It is *the known Law of* Scotland, That *a Minor, with the Conſent of his Curators*, or by himſelf, where he hath none, *has the ſame Power over his Eſtate, as if he was of full Age*, under this *ſingle* Exception, *unleſs the Minor himſelf is leſed by the Deed*. Multitudes of Caſes might be brought, where the Court of Seſſion *hath ſo adjudged*; but it is enough in place of all, to mention the late Caſe of *Muirhead* of *Drumpark*, where the Lords found, *That a Minor in his Marriage Settlement, could even alter former Inveſtitures, and give his Eſtate, to the Heirs whoever of his Marriage, which ſtood provided by the former Inveſtitures, in Favours of the Heirs-male*. The Earl does then willingly ſubmit it to the Lords, whether theſe Deeds fall under the *Rule*, or if they do fall under the *Exception?* Earl's Anſ. to the Object. of Minority.

The Procurators for the Marquis of *Clydſdale* were at ſome Pains to ſhow, That Earl *William* 3d had ſuffered *no Leſion* by executing the foreſaid Procuratory in the Year 1722, in reſpect of the *prior Deed* of his Father, *in Compliance* wherewith he had granted it. It was further ſaid to be a received *Maxim* in our Law, that a *Minor cannot prejudge his Heirs*.

But in the *firſt* Place, beſides, That let the Bond 1716, be underſtood *as it will*, this Procuratory, as has been fully ſhown, was quite *another Thing*: So the Gentlemen ſeem to Miſtake the Caſe, when they argue in that Manner; the Queſtion is not here, *whether he ſuffered Leſion* by granting the Procuratory 1722, *or not*: Nor does it much Concern the Caſe, *Whether it was in Implement of his Father's Bond or not*; But the ſingle Queſtion is, *Whether he ſuffered any Leſion by the Deeds*, by which *he altered both?* And 'tis believed, *No Man alive will ſay or think that he did*. For, not to mention the *Oneroſity* of thoſe Deeds, in reſpect of the *Settlement* then made upon him and his Family by the Earl of *Dundonald*, that now is, without *reſerving* to himſelf a Power to alter, the Deeds were ſo far from being *a Leſion to him*, that they were of their own Nature *rational and onerous*, with reſpect to himſelf and his Family, the *Ruin whereof* they were calculated to prevent. E. Will. III. not leſed by the Deeds 1725.

And as to the Pretence, that a Minor cannot prejudge his Heir, The Earl hopes, in what remains of the Argument, to ſhow, that the Dutcheſs of *Hamilton*, who is here meant, was *in no Senſe* Heir to him, tho' that is a Conſideration not very Material upon this Part of it. It may be true, Heirs of Minors not prejudged, unleſs the Minor be leſed.

true, that it is a Thing *commonly said*, that a Minor cannot prejudge his Heir: But that proceeds from *no principle in Law*, but becauſe *generally ſpeaking*, theſe two go together, and are the ſame, *a Leſion to the Minor himſelf*, and *a Leſion to his Heir and his Family*: But as, where the Heir of a Minor purſues a Reduction of the Minor's Deed, it is not in his *own Right*, but in the Right *of the Minor, to whom he ſucceeds*, that he is entitled to it. So if a Caſe can be figured, in which a Leſion to the *Minor's Heir* is not a Leſion to the *Minor himſelf*, there is *no Place* for the *Reduction*; nor can there happen a *ſtronger Inſtance* than *that in hand*. Earl *John* the Minor's Father is on this Argument *ſuppoſed* to have intended to *diſinherite* the preſent Earl of *Dundonald* of his Eſtate, while at the ſame Time he was *the Perſon* who muſt inevitably have *repreſented* him in his *Name and Honours*, which, if it was the *Intention*, was the moſt *irrational Action* of that Gentleman's Life, *a Deed*, which had he been *Minor* when he did it, he could have *reduced* on the Head of *Leſion*, tho' the Deed it ſelf had been otherwiſe of its Nature *unalterable*. Can there any Thing then, be more unreaſonable than to ſay, That his Son *the Heir of his Family* was leſed by the Alteration of *ſuch Deed*?

The Curators Proſpect of Succeſſion no Objection.

As to the Inſinuation concerning the Curators who conſented, 'tis believed to be made uſe of rather as a *Circumſtance* than an Argument in Law; for whatever Objection that might be to their *own Intereſt*, if they had any, it can afford no Argument to ſet aſide *the Earl's Intereſt*, in whoſe Favours the Right was made, and who was none of their Number.

The Object. of *Death-bed* explained.

The Objection of Death-bed is of a different Nature from the former; For upon this Point the Queſtion is, whether by the Deeds there was a Leſion to his Heir? It is peculiar to the Law of *Scotland*, That no Man can do a Deed on Death-bed in Prejudice of his Heir; a *Law* introduced by no poſitive *Statute*, but founded on *a Cuſtom*, that had its Riſe, from the Influence the *Popiſh* Clergy before the Reformation had on dying Perſons, which they frequently abuſed, in impreſſing the Notions of Merit by pious Donations, to the Prejudice of lawful Heirs. Tho' the *Cauſe* is happily long ago removed, the *Cuſtom*, it muſt be owned, continues: But the Earl takes the Obſervation to be of this Uſe, that as the Law of Death-bed is become our Law only by *Cuſtom*, and *a Cuſtom* the Original and Riſe whereof is removed, the ſame is by the Rules of Law not to be extended, but to be taken in the moſt limited and narrow Senſe.

Cuſtoms are not to be extended.

It is a Rule in judging in Matters of *Cuſtom*, that they are not to be extended *a pari*, as *Statute* Law may be: So far as *Cuſtom* has gone, it is a Law and no further: And the Earl humbly believes, there is not an Inſtance can be condeſcended on, where in *the like Caſe*, with the preſent, *Death bed* was pled and *ſuſtained*.

The Procur. 1722. falls with the Deed 1716.

Having made theſe general Obſervations, the Earl ſhall only further premiſe, before he proceed to the particular Argument, that there is no Occaſion here for any ſeparate Conſideration of the Procuratory 1722. from that of the Bond of Entail 1716; For if the Procuratory 1722; did put the minor Grauter under the leaſt Reſtraint, that he was not under

der by his Father's Obligation, it was *eo ipso* a Leſion, and reducible *quoad tempora* of his Life; for the Reduction on the Law of *Death-bed* can never ſtrike againſt the Revocation of a Deed, where the Revocation might have been obtained by way of Action.

Anſ. to the Objection of Death-bed.

The ſingle Queſtion then is, whether *Death-bed* be a good Objection to the Alteration of the Bond of Entail 1716; and the Earl contends it is not. 1ſt, Becauſe he conceives neither the Marquis nor the Dutcheſs of *Hamilton* his Mother, were in any Senſe Heirs to Earl *William*, whoſe Deeds are craved to be reduced, for that they could not have even ſerved Heirs of Proviſion to him. 2dly *Eſto*, They could have been ſerved as Heirs of Proviſion to him, yet an Heir of Proviſion, who cannot ſerve in the Subject, is not *ſuch* an Heir, as in Law is entitled to the Privilege of Death-bed.

There muſt be ſomething in the Perſon of a Defunct to make a Service neceſſary.

For clearing the *firſt* of theſe Points, it is certain there can be no Service, except where there is ſomething to be *tranſmitted* from the *dead* to the *living*: But ſo it is, there was nothing in the Perſon of Earl *John* to be carried by a Service; for either it muſt have been the *Lands*, or ſome *Right of Obligation*: Now the *Lands*, 'tis plain, my Lady Dutcheſs could not have carried by a Service, becauſe no Body can ſerve in Lands but the Heir of the former Inveſtiture; neither was there any *Obligation* to which ſhe could ſerve: For tho', where a Perſon grants an Obligation to reſign Lands in Favours of *himſelf*, and the Heirs-male of his Body; whom failing, in Favours of another; *That other* may and muſt in that Caſe, upon the Failure of him and his Heirs-male, carry that Right of Obligation by a Service to him, as Heir of Proviſion, becauſe *that Right of Obligation, being taken firſt to the Granter, was lodged in himſelf*, and muſt be carried out of his Perſon by a Service: Yet, if, on the other Hand, one ſhould grant an Obligation, *not firſt* in Favours of himſelf, but directly *in Favours of another*, to take Place in a certain Event; upon the happening of that Event there could be no Service, becauſe there was *nothing in the Granter* to be carried by it.

There was nothing in the Perſon of Earl John to be carried by a Service.

To apply this Reaſoning to the preſent Caſe; Earl *John* is not thereby obliged, by the Bond of Entail 1716, to reſign in Favours of himſelf; whom failling, in Favours of Lady *Anne*; but he *directly* obliges himſelf to *reſign to Lady Anne*: There was therefore nothing in the Perſon of the Granter, which ſhe could carry by a Service, in the Event the Obligation was to take Effect. 'Tis true, that by the ſubſequent Part of the Deed, he appoints her to be Heir to him, or to the Heirs-male of any of the Deſcendants of his Body; but it is not in the Power of any Man to make a Perſon Heir to him, unleſs the Deed he grants be of that Nature, that the Perſon in whoſe Favours it is conceived, can by the Law be an Heir in it. The nominating of her Heir has indeed this Effect, That whereas he had by the obligatory Part made her a Creditor, yet being named Heir, ſhe can quarrel no Alteration more than an Heir could have done, tho' that will not make her an Heir in the Eye of Law: Perhaps he intended to have made her an Heir, but he has not done it: She had upon this Deed only an Action, but could not ſerve, more than

in

in any Case a *Creditor* can need a Service, to give him a *Title* to the *Obligation* granted to himself by his *Debitor*.

To this Purpose there is an apposite Passage in the Lord *Stair*, P. 441. where he treats this very Question concerning the Law of Death-bed, and what it is that makes one an Heir in the Sense of that Law, he tells us in so many Words, *That if by Contract one of the Parties be provided to be the other's Heir in Whole or in Part, this Provision doth not make the Party Heir in any Right whereupon Infeftment hath followed, which only properly are heritable Rights; nevertheless that Party*, says he, *cannot be served Heir of Provision to the Contracter thereupon*, tho' he adds, *The Contracter or his Heirs may be* compelled *to denude themselves, &c.* Than which nothing can be more apposite to the present Case.

An Heir of Provision is not regularly an Heir, in the Sense of the Law of Death-bed:

But then in the *Second* Place, *Esto* my Lady Dutchess could have served Heir of Provision, yet as by the original Constitution of the Law of Death bed, so far back as any Record of it is to be found, such an Heir of Provision, as her Grace could have been in this Case, had not the Benefite of the Law of Death-bed, but singly the Heir of the Investiture, or in other Words, the Heir in the Subject alienated. Unless it can be shown, that *Custom*, by the Course of your Lordships Decisions, has extended it to *such* Heirs of Provision, which 'tis believed cannot be done; *Such Heir* of Provision is not an Heir in the *Sense* of the Law of Death-bed.

The oldest Account we have of it, is in the Books of the *Majesty*, *L. 2. Chap.* 18. where 'tis said, "One cannot alienate his Lands on Death-bed, in "Prejudice of his Heir:" Now it is certain, That at that Time there was no *gratuitous* Heir of Provision known in our Law, such as my Lady Dutchess behoved at best to be on this Deed; for in that very same *Chap.* of the *Majesty*, we find, That according to our Law at that Time, such an Obligation as this is, had it remained personal at the Death of the Granter, was a Deed to all Purposes void. The Words are, That *according to the Consuetude of this Realm sick an Donation*, Meaning, as appears by the Words of the preceeding Paragraph, *where* the Grant, *remains personal* and not compleated by Infeftment, is understood to be *an Heght* (that is a *Promise* only) *and not an effectual Gift*; whereof it is a plain Consequence, That he, in whose Favours it was conceived, could not be comprehended in the following Words of the same Chapter, *which forbid* the Heir to be prejudged; and tho' it should be admitted that by the Law, as it now stands, *such* personal Obligations entitle those in whose Favours they are conceived to serve Heirs of Provision, and thereupon to pursue the proper Heir to denude, yet it does not follow, that the Law of Death-bed is further extended than its original Constitution, but that the same Alteration is allowed on Death-bed, as might have been made *in liege poustie*. We have *a late Statute restraining Death-bed, but neither Law nor Reason for extending it.*

But only where his Service carries the Subject.

The Earl would not be so understood, as if he meant that no Person, who is called an Heir of Provision, can *as such* pursue a Reduction on

Death-

Death-bed; he believes *there are* Heirs of Proviſion, who by Cuſtom are entitled to it; but then it will be found, That this only happens where the Proviſion in their Favours makes them proper Heirs in the Subject alienated, as in the Caſe of an heritable Bond without Infeftment or the like, conceived in Favours of the Creditor, with a Subſtitution, in which Caſe the Service of the Subſtitute *carries the Subject*: And the Earl pleads, That in no other Caſe, but where the Service *carries the Subject alienated*, can there be *an Heir* in the Senſe of the Law of *Death bed*.

The only Deciſion, which the Earl believes can be adduced for the Marquis of *Clydſdale* on this Point, is that of *Hepburn* againſt *Hepburn*, in the 1663: But the learned Author, who remarks it, has likewiſe obſerved, *That Parties had before Hand agreed*; wherefore it ſhall give no Offence to ſay, *That it ought not to have the Authority of a Deciſion*; and Preſident *Gilmore*, who alſo obſerves the Deciſions of that Time, has taken no Notice of it.

It may likewiſe not be improper to obſerve, that *Craig* our learned Author, after he had told us on the Subject of Death-bed, *Lib.* 1. *dieg.* 11. *Page* 35. that *in lecto ægritudinis nemo poteſt hæredi ſuo præjudicare*, when he comes to explain who it is, that can ſucceed *as Heir*, *Lib.* 2. *dieg.* 13. *P.* 225, his Words are, *Apud nos is ſolus hæres eſt, qui in feudum rerum immobilium aut rei alicujus immobilis ſuccedit*; and afterwards, *P.* 230. *Nemo proprie hæres dicatur niſi qui a lege, ad ſucceſſionem vocatur, ſunt enim qui non ex lege ſed ex conventione partium ſuccedunt, ſed hi nomen hæredis non merentur*, in other Words, *Hæres non eſt, qui ex deſtinatione, aut conventione partium ab hærede petere poteſt, talis enim nomen hæredis non meretur*. The Privilege of Death-bed, is none of the natural Conſequences of being called an *Heir*, ſo as to belong to every Perſon, who, by a Service as Heir, may, by the Law as it now ſtands, carry an Obligation, in vertue whereof they can, by Way of Action, come at the *Subject*. It was originally, only a Privilege given to the proper Heir *in the Subject*, and *Cuſtom* has not extended it further.

Nor has *Cuſtom* extended it further.

And ſurely, as there is no Reaſon for extending it *in general*, the Earl may take the Liberty to ſay, there is yet much leſs in this *particular Caſe*: The Deed complained of, is a Deed revoking *a former*; which *former* Deed was, in the Eye of the Law, a *Leſion* and Prejudice to the Granter and his Family, in ſo much, that had the Granter of it been on Death-bed when he made it, it could have been reduced by Earl *William* his Heir, nay by the preſent Earl, upon *that ſingle Ground*: And as the Law of Death-bed was introduced for preventing Impoſitions and Abuſes to the Ruin of a Family, and was founded upon a Preſumption, That the Man, who in his Sickneſs prejudged his Family by a Deed he had not thought of while in Health, *was at that Time not of ſound Judgment*; Should it not be even an irrational Thing that the Deed of his Succeſſor rectifying that very Abuſe, ſhould be reducible upon the ſame Ground of Law, on which the Deed itſelf, by which the Abuſe came, could have been reduced.

Particular Reaſons why it ſhould not, in this Caſe.

Your

Your Lordſhips have now the Caſe fully before you: The Importance of the Queſtion, and Number of the Points, will plead the Earl of *Dundonald*'s Excuſe for the Length to which this Paper has ſwelled: He has endeavoured to lay it, with all the Perſpicuity and Connection he was capable of: And, as he believes he has the Law on his Side, as well as the Favour of the Caſe, he does, with humble Aſſurance, expect your Lordſhips Deciſion in his Favours.

In reſpect whereof, &c.

JA. FERGUSSON.